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SUPREME COURT, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

COLORADO LIBERTARIAN PARTY and ROBIN HEID,

Petitioners,

vs.

SECRETARY OF STATE OF COLORADO, Natalie Meyer, in her official capacity and not individually,

Respondent.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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February 5, 1992

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QUESTIONS PRESENTED

1. Whether Colorado's twelve month unaffiliation requirement for certain political candidates is narrowly tailored to advance a compelling state interest as mandated by the constitutional standards recently reaffirmed by this Court in *Norman v. Reed*.

2. Whether a state impermissibly intrudes on constitutionally protected associational interests by applying an unaffiliation requirement to the candidate of a minor or new political party, when the unaffiliation requirement: (a) conflicts with the party's own candidate eligibility rules; and (b) is not applied by the state against the two major political parties.

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SECRETARY OF STATE OF COLORADO, Natalie Meyer, in her official capacity and not individually,

Respondent.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari be issued to review the judgment and opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at *Colorado Libertarian Party v. Secretary of State*, 817 P.2d 998 (Colo. 1991), and is included in the Appendix at 1-48. The opinion of the District Court is in the Appendix at 49-50.

JURISDICTION

The Opinion and Judgment of the Colorado Supreme Court was entered on October 7, 1991. This Court granted petitioners an extension of time to file this petition through February 5, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 14 of the United States Constitution provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colo. Rev. Stat. § 1-4-801(1)(i) provides in part: "No person shall be placed in nomination by petition unless the person . . . was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition."

STATEMENT OF THE CASE

A. Factual Background

Petitioner Colorado Libertarian Party (the "CLP") is the Colorado affiliate of the national Libertarian Party. The Colorado Secretary of State does not recognize the CLP as a "political party" under Colo. Rev. Stat. § 1-1-104(18), App. at 55. Instead, the CLP is termed a "political organization" under Colo. Rev. Stat. § 1-1-104(17), App. at 55. A political organization is defined in one respect as an organization that failed at the last gubernatorial election to achieve the required number of votes to qualify as a political party. *See* § 1-1-104(17) and (18), App. at 55. As a result of not being a political party, CLP must place its nominees on the state ballot by petition.

The CLP has adopted a Constitution and By-Laws defining membership in the CLP and specifying the procedure for nominating CLP candidates. A person may become a member either by registering with the State as a Libertarian or by paying dues. Once a member, the only requirement imposed by the CLP on a prospective candidate is that he or she not believe in or advocate the initiation of force as a means of achieving political or social goals.

On April 21, 1990, the CLP convention nominated petitioner Heid as its candidate for Governor of Colorado. It is undisputed that petitioner Heid was a member of the CLP under its own rules at the time of his nomination. Heid was also a member of the Colorado Republican Party by virtue of his registration with the State as affiliated with that party in the early 1980's.

Pursuant to his nomination as the CLP candidate, Heid submitted a petition to the Colorado Secretary of State to have his name placed on the November 1990 ballot. However, the Secretary of State rejected the petition on the ground that Heid was not registered as a Libertarian or as "unaffiliated" for at least one year prior to the filing of the petition for nomination, as required by Colo. Rev. Stat. § 1-4-801(1)(i), App. at 54.

Prior to 1984, Colorado law permitted candidates for public office to register only as Republican, Democrat or unaffiliated. In 1984, responding to the Tenth Circuit's direction in *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984), Colorado's Secretary of State redefined the term "unaffiliated" in § 1-4-801(1)(i) to allow minor party candidates to register either as unaffiliated or as affiliated with certain minor political parties defined as "qualified political organizations." *See* Colo. Secretary of State Rule 16.1, 8 Colo. Code Regs. 1505-1, App. at 59. It is undisputed that the CLP is a qualified political organization under the Secretary of State's Rules. It is also undisputed that petitioner Heid did not meet the unaffiliation requirement because he was still registered on the State's records as a Republican, and not as a Libertarian, when he was nominated by the CLP for the office of Governor.

Colorado does not impose a similar unaffiliation requirement on the nominees of the two major political parties. Such a requirement on the major political parties for purposes of primary elections, Colo. Rev. Stat. § 1-4-601(4), App. at 57, was struck down as unconstitutional by a Colorado state district court in *Colorado Democratic Party v. Meyer*, No. 88CV7646 (Dist. Ct., City and County of Denver, Colo. May 3, 1988). *See* App. at 64-73.

There, the Secretary of State rejected the nomination for the Democratic Party primary election of a person who had been formerly registered as a Republican and who had not been registered as a Democrat for the time period prescribed by the statute. However, the candidate had satisfied the affiliation rules of the Democratic Party. The state judge invalidated the statute and permitted the nomination based on this Court's decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), holding that "the Colorado Democratic Party has a right to determine who may be affiliated with that party." App. at 72. The Secretary of State did not appeal this decision. Thus, under Colorado's statutes, rules and case law, a Democrat (or Republican) can run for public office by satisfying only the affiliation rules of his/her party and without satisfying stricter statutory rules, but a Libertarian cannot.

B. Proceedings Below

After the Secretary of State's rejection of Heid's nomination, petitioners filed a petition in Colorado state district court pursuant to Colo. Rev. Stat. § 1-1-112 on September 4, 1990, to enjoin respondent from enforcing § 1-4-801(1)(i) and to have that statute determined unconstitutional as applied to petitioners. The district judge denied the petition. An appeal to the Colorado Supreme Court followed.

The Colorado Supreme Court affirmed the district court in a 6 to 1 decision approximately three months prior to this Court's recent decision in *Norman v. Reed*, Nos. 90-1126 and 90-1435, 60 U.S.L.W. 4075 (January 14,

1992). Without the benefit of *Norman*, the Colorado court erroneously determined that this Court:

> has approached the constitutionality of ballot access restrictions in an inconsistent manner, at times applying a strict standard of scrutiny, *see Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968), and at other times employing a more flexible standard, *see Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (following *Storer v. Brown*, 415 U.S. 724, 730 (1974) . . .); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

App. at 8. Perceiving itself bound to choose between two "conflicting" standards, the Colorado court elected to follow its inaccurate characterization of the balancing test set forth in *Anderson*. As a consequence, the Colorado court failed to require the State, consistent with *Norman*, 60 U.S.L.W. at 4077, and *Anderson*, 460 U.S. at 806, to demonstrate that the twelve month unaffiliation requirement is a narrowly tailored means to advance the State's proferred interest.

Instead, the Colorado court held simply that the one-year unaffiliation requirement "preserves the state's compelling interest in 'maintaining the integrity' of its ballot access system . . . and thus promotes the overall stability of the state's election process, without 'unfairly or unnecessarily' impinging upon the CLP's associational rights." App. at 13-14 (citations omitted). In so holding, the only *specific* state interest identified by the court was its statement of concern over "the situation in the present case where a political organization's lack of any affiliation

requirement for prospective candidates has a disorganizing effect on other political parties or organizations." App. at 17. The court failed to elaborate on how CLP's nomination of Heid was disorganizing to the Republican Party.

It was clearly difficult for the court to identify a specific state interest advanced by Colorado's unaffiliation statute, particularly given its case law and rulemaking evolution. As required by this Court's rulings, a lower court must determine whether a statute serves a compelling state interest by considering "[t]he plain meaning of the statute's words, enlightened by their context and contemporaneous legislative history [as well as] the historical context of the statute . . . and the specific sequence of events" leading to the statute's adoption. *Edwards v. Aquillard*, 482 U.S. 578, 594-95 (1987). The court could not look to the legislature's intent because it was the Secretary of State, not the legislature, who applied Colo. Rev. Stat. § 1-4-801(1)(i) to "qualified political organizations" by virtue of Rule 16. Indeed, "political organizations" were not even recognized by Colorado in 1981 when the statute was enacted. Accordingly, there is no contemporaneous legislative history to determine the state's precise interest.

Having vaguely defined the State's interest, the Colorado Supreme Court considered *Storer v. Brown*, 415 U.S. 724 (1974), dispositive. *Storer* upheld a state's twelve month unaffiliation requirement in a situation involving an *independent* candidate, not the candidate of a political party. *Storer* did not consider the associational interests of political parties, nor did it face a situation where the two

major political parties did not have to meet the requirements imposed on the CLP here.[1]

In contrast to the majority opinion below, the dissent identified as controlling authority this Court's decisions concerning the associational interests of political parties. App. at 41. Consistent with *Norman*, the dissent conducted an inquiry into whether the State's unaffiliation requirement was narrowly tailored to advance the State's asserted interests. *Id.* at 46-48. Applying the proper authorities and standards, the dissent found the unaffiliation requirement unconstitutional.

REASONS FOR GRANTING THE PETITION

This case is worthy of this Court's review because the Colorado Supreme Court has decided an important question of federal law in a way that conflicts in two major respects with the applicable decisions of this Court.

First, contrary to *Norman v. Reed*, the Colorado court identified a nonexistent inconsistency among this Court's decisions and, in choosing among what it perceived as

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[1] The court also relied to a limited extent on *Rosario v. Rockefeller*, 410 U.S. 752 (1973). *See* App. at 14. *Rosario* upheld a voter affiliation requirement as serving a state's interest in preventing party "raiding" in primary elections. *Compare, Kusper v. Pontikes*, 414 U.S. 51 (1973) (striking down a similar but more restrictive statute). Party raiding is not a concern in a general election because voters can vote for whichever candidate they choose. *Anderson*, 460 U.S. at 801-02 n.29. Thus, *Rosario* is inapposite.

conflicting standards, failed to require the State to demonstrate that the twelve month unaffiliation requirement is a narrowly tailored means to achieve the State's interest.

Second, the court improperly depreciated the associational interests of minor political parties such as the CLP by allowing infringement upon those interests by a state affiliation requirement which: (a) conflicts with the party's own candidate eligibility rules; and (b) is not imposed by the state on the two major political parties.

A. The court improperly failed to require the State to demonstrate that its twelve month candidate unaffiliation requirement is narrowly tailored to advance a compelling state interest as mandated by the constitutional standards recently reaffirmed by this Court in *Norman v. Reed*.

This case is worthy of review because the Colorado Supreme Court has truncated this Court's test for determining the constitutionality of state limits on ballot access, which was most recently restated in *Norman v. Reed*. *Norman* reaffirms that the cases of this Court which the Colorado court considered incompatible, most notably *Anderson* and *Socialist Workers Party*, are consistent and should be read together. *Norman* summarized the standard for determining the constitutionality of state limitations on the associational interests of political organizations as follows:

> To the degree that a State would thwart this [first amendment associational] interest by limiting the access of new parties to the ballot, we

> have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, *see Anderson, supra,* at 789, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. *See Socialist Workers Party, supra,* at 184, 186.

60 U.S.L.W. at 4077. Consistent with these standards, *Norman* conducted a "narrowly drawn" analysis and determined that the challenged Illinois statute was broader than necessary to serve the State's asserted interest in preventing misrepresentation and electoral confusion. *Id.* at 4078. The Illinois statute was also not the "most narrowly tailored means" of advancing Illinois' other asserted interest in limiting ballot access to parties with demonstrated public support. *Id.* at 4078-79.

The Colorado Supreme Court's failure to engage in the "narrowly drawn" inquiry is in direct conflict with *Norman* and a long line of this Court's cases. *See, e.g., Eu v. San Francisco County Democratic Cent. Committee,* 489 U.S. 214, 222 (1989) (state statute burdening the rights of political parties and their members can survive constitutional scrutiny "only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest"); *Anderson,* 460 U.S. at 806 (" '[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties' ") (quoting *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973)).

Significantly, the dissent to the Colorado court's decision suggested three less drastic means for advancing the

State's interest than the State's twelve month unaffiliation requirement. App. at 47-48. To advance the asserted interest in ensuring that "prospective candidates [do not] have a disorganizing effect on other political parties or organizations," *id.* at 17, the State could prevent a defeated primary candidate from running as the candidate of another party in the general election or prohibit a candidate from running on more than one ticket. *Id.* at 47.

Alternatively, consistent with the State's treatment of the two major political parties, the State could require that a candidate simply satisfy the party's membership rule in order to qualify for ballot access. *Id.* As this Court suggested in *Norman*, a state can prevent electoral confusion and misrepresentation by relying on political parties themselves to formally identify their candidates and enforce their own membership and candidate eligibility rules. 60 U.S.L.W. at 4078.

Since the Colorado court failed to apply the proper test, and since a different result would occur under that test, this Court should issue a writ of certiorari. The Court could either fully review the case, or simply remand to the Colorado court for reconsideration in light of *Norman*. For the reasons stated below, a full review is warranted.

B. The court improperly denigrated the petitioner political party's associational interest by upholding the application of an unaffiliation requirement to the candidate of the party even though the unaffiliation requirement:

(a) conflicts with the party's own candidate eligibility rules; and

(b) is not imposed by the State against the two major political parties.

This case is also worthy of review because the lower court decision creates an unreasoned distinction between the constitutional rights of major and minor political parties. The Colorado court correctly recognized that the relevant interest of the petitioners in this case is the associational interest of the members of the CLP in designating and selecting CLP's candidate for a statewide office in accordance with CLP's rules. App. at 9-10. However the court's holding depreciates the importance of the associational interests of minor or new political parties in a manner which cannot be reconciled with the applicable decisions of this Court.

Several of this Court's decisions have invalidated as unconstitutional state statutes that infringe upon the associational interest of political party members in selecting candidates to represent their party pursuant to the party's own rules. *See Eu v. San Francisco County Democratic Cent. Committee,* 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986); *Anderson v. Celebrezze,* 460 U.S. 780 (1983).

In *Tashjian,* the Court struck down a law prohibiting political parties from allowing people who were not

members of the party to vote in the party's primaries as violative of a political party's right to select nominees of its own choosing and in its own manner. *Tashjian*, 479 U.S. at 217-18. Similarly, in *Eu* the Court declared that California's restrictions on the internal policy governance of political parties unconstitutionally burdened the associational interests of political party members in selecting a "standard bearer who best represents the party's ideologies and preferences," 489 U.S. at 224 (quotation omitted), and in " 'determin[ing] . . . the structure which best allows it to pursue its political goals,' " *id.* at 229 (quoting *Tashjian*, 479 U.S. at 224).[2]

In spite of this authority, the court below upheld the application of Colorado's unaffiliation statute to prevent CLP from having its preferred "standard bearer," Heid, on the gubernatorial ballot in 1990. The court upheld statutory candidate eligibility criteria which exceed CLP's own established criteria. The court summarily dismissed *Eu* and *Tashjian* as "not address[ing] the issue of whether the state may make distinctions between political organizations and political parties in maintaining the integrity of . . . its ballot access system." App. at 17. In so holding, the lower court created, and then upheld as enforceable, a distinction between minor and major political parties.

Contrary to the Colorado court's holding, the principles of *Eu* and *Tashjian* apply equally to minor and major political parties. *Eu* involved a challenge made by the central committee of the California Libertarian Party as

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[2] In this case, as in *Eu* and *Tashjian*, the party is seeking to expand the range of electoral choices open to the voters through the application of its content-neutral rules.

well as by the central committees of the Democratic and Republican Parties and other interested political groups. Significantly, the Court did not distinguish among these groups in its constitutional analysis. Instead, the Court spoke broadly of the rights of "political organizations." 489 U.S. at 224; *see also Tashjian*, 479 U.S. at 214-15 (referring broadly to the rights of political organizations and associations). Just last month in *Norman* this Court invalidated an Illinois statute which limited the ability of the new Harold Washington Party – an Illinois equivalent of Colorado's "political organizations" – to authorize candidates to use its party name for ballot purposes according to the party's own rules. 60 U.S.L.W. at 4078.

This Court should grant this petition because the Colorado court's decision stands in direct conflict with these authorities. The court supplies not one state interest for subjecting new and minor political parties to Colorado's unaffiliation requirement while exempting the two major parties. In fact, the state's asserted interest in the unaffiliation statute is not supported by *any* specific explanation or evidentiary showing. This omission alone is enough to invalidate the statute and justifies this Court's review. *See Eu*, 489 U.S. at 226, 232 (state infringement on associational rights invalidated based on lack of showing that statutes advanced the asserted state interests).

CONCLUSION

Petitioners respectfully request that a writ of certiorari be granted.

Respectfully submitted,

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February 5, 1992

SUPREME COURT, STATE OF COLORADO
NO.90SA382 October 7, 1991

COLORADO LIBERTARIAN PARTY
and ROBIN HEID, Petitioners-Appellants,

v.

SECRETARY OF STATE OF COLORADO,
Natalie Meyer, in her official
capacity and not individually, Respondent-Appellee.

Appeal from the District Court,
City and County of Denver
Honorable Ralph H. Coyte, Judge*

EN BANC JUDGMENT AFFIRMED

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, sec. 5(3), and § 24-51-1105, 10B C.R.S. (1988).

JUSTICE VOLLACK delivered the Opinion of the Court.
JUSTICE LOHR specially concurs.
JUSTICE MULLARKEY specially concurs.
JUSTICE QUINN dissents.

Appellants, the Colorado Libertarian Party (CLP) and Robin Heid (Heid), appeal the district court's ruling that the unaffiliation requirement in section 1-4-801(1)(i), 1B C.R.S. (1980), of the Colorado Election Code of 1980 does not violate appellants' right to political association, U. S. Const. amends. I & XIV; Colo. Const. art. II, § 5, or their right to equal protection of the laws, U.S. Const. amend. XIV; Colo. Const. art. II, § 25. We affirm.[1]

I.

This action arises from appellant Heid's efforts to become the CLP candidate in the 1990 Colorado gubernatorial election. The CLP is the Colorado affiliate of the national Libertarian Party and is a "qualified political organization" within the meaning of Colorado Secretary of State Rule 16, 8 C.C.R. 1505-1 (1984).[2] The CLP has

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[1] Section 13-4-102(1)(b), 6A C.R.S. (1987), grants this court jurisdiction over appeals when the constitutionality of a statute is at issue.

[2] Rule 16.1 defines a "qualified political organization" as

> one which has placed on the ballot at a congressional vacancy or general election a candidate for district or state office and whose officers have filed under oath with the Secretary of State the required proof of organization and which continues to meet the requirements of 16.3 [meet once a year] and 16.4

(Continued on following page)

adopted a constitution and by-laws that outline its membership requirements and procedures for nominating CLP candidates. Membership in the organization occurs when an applicant either registers as a Libertarian voter in Colorado or pays the requisite membership fee established by the CLP Board of Directors, or both. The only requirement imposed on prospective CLP candidates is the submission of a signed statement by the candidate that he or she does not believe in or advocate the initiation of force as a means of achieving political or social goals.

Heid has been registered as a member of the Colorado Republican Party since April 25, 1980. On May 27, 1988, Heid also became a member of the CLP by paying a $25 membership fee to the CLP finance chairman, which entitled Heid to membership in the CLP for one year. In 1988, Heid circulated a petition for nomination as the

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[place a candidate or candidates on the general election ballot every two years].

A "political organization" is defined by statute as "any group of registered electors who, by petition for nomination of an independent candidate as provided in section 1-4-801, places upon the official general election ballot nominees for public office." § 1-1-104(17), 1B C.R.S. (1990).

A political organization differs from a political party, which is defined as "any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election." § 1-1-104(18), 1B C.R.S. (1980).

CLP candidate for the First Congressional District, but did not receive a sufficient number of signatures to be placed on the ballot. On April 21, 1990, Heid renewed his CLP membership by paying the $25 fee. In convention on that same day, the CLP nominated Heid as its candidate for Governor of Colorado in the 1990 gubernatorial election. At the time of Heid's nomination, he was both a member of the CLP pursuant to its by-laws and constitution and a member of the Republican Party by virtue of his registered affiliation with that party.

On June 9, 1990, Heid attended the Republican Party State Assembly as a candidate for the Republican nomination. Heid's name was placed in nomination, but before the votes were announced, Heid committed his votes to John Andrews, who won the Republican gubernatorial nomination. Pursuant to his nomination as the CLP candidate, Heid submitted a petition to appellee Secretary of State, Natalie Meyer, to have his name placed on the November 1990 ballot.[3] In a letter dated August 15, 1990, the State Elections Officer notified Heid that his petition had been rejected for his failure to register either as a Libertarian or as unaffiliated, and thus to disaffiliate himself from the Republican Party, at least one year prior to

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[3] Section 1-4-801, 1B C.R.S. (1980 & 1990 Supp.), governs petitions for nominating candidates of political organizations pursuant to Rule 16.6, 8 C.C.R. 1505-1 (1984), which provides that "[c]andidates wishing to represent a qualified political organization on the General Election ballot shall be placed in nomination by independent nominating petition pursuant to C.R.S. 1-4-801."

filing his petition for nomination, as required by section 1-4-801(1)(i), 1B C.R.S. (1980).

On September 4, 1990, the CLP and Heid filed a verified petition in district court pursuant to section 1-1-112, 1B C.R.S. (1980),[4] requesting the court to enjoin the Secretary of State from enforcing section 1-4-801(1)(i) against the CLP and Heid, to declare section 1-4-801(1)(i) unconstitutional, and to award the CLP and Heid costs and attorney's fees under 42 U.S.C. § 1983. The district court denied the appellants' request for relief based on its conclusion that section 1-4-801(1)(i) was constitutional and that the Secretary of State properly rejected Heid's petition for nomination.

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[4] Section 1-1-112(1), 1B C.R.S. (1980), governs election-related controversies and provides:

> When any controversy arises between any official charged with any duty or function under [the Colorado Election Code of 1980] and any candidate, the officers or representatives of any political party, persons who have made nominations, or any other person, the district court, upon the filing of a verified petition by any such official or person setting forth in concise form the nature of the controversy and the relief sought, shall issue an order commanding the respondent in such petition to appear before the court and answer under oath to such petition. The court shall summarily hear and dispose of any such issues with a view to obtaining substantial compliance with the provisions of this code by the parties to such controversy, shall make and enter orders and judgments, and shall issue the writ or process of such court to enforce all such orders and judgments.

II.

We must determine whether the unaffiliation requirement in section 1-4-801(1)(i), 1B C.R.S. (1980), violates the rights of CLP and Heid to political association and equal protection of the laws under the United States Constitution and the Colorado Constitution.

Section 1-4-801 outlines the petition procedure by which candidates for public office who do not wish to affiliate with a political party may be nominated, other than by a primary election or a convention. For prospective candidates choosing this route to the ballot, section 1-4-801(1)(i) imposes a twelve-month unaffiliation requirement from a political party. Section 1-4-801(1)(i) provides in relevant part:

> No person shall be placed in nomination by petition unless the person . . . was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition . . . .

In response to the Tenth Circuit's instruction in *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984),[5] Colorado's

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[5] Prior to the Tenth Circuit's decision in *Baer*, a person who was affiliated with a political organization was required to register as unaffiliated even though the organization had recognized officials and had previously placed a candidate on the ballot by petition. In *Baer*, the Tenth Circuit found that the Citizens Party of Colorado and the Colorado Libertarian Party qualified as organizations entitled to designation on the voter registration forms because they previously managed to field candidates on the ballots by the petition process. 728 F.2d at 476. The court cautioned that its opinion did not require the Secretary of State to recognize any political organizations other

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Secretary of State refined the meaning of the word "unaffiliated" in section 1-4-801(1)(i), by promulgating Rule 16, 8 C.C.R. 1505-1 (1984), to allow candidates not affiliated with a political party to register as either unaffiliated or as affiliated with a "qualified political organization." Thus, "unaffiliated" as used in section 1-4-801(1)(i) now means unaffiliated with a political party. It is undisputed that the CLP is a "qualified political organization" within the meaning of Secretary of State Rule 16 and that section 1-4-801(1)(i)'s twelve-month unaffiliation requirement applies to all prospective candidates of the CLP by virtue of Rule 16.6, which advises that "[c]andidates wishing to represent a qualified political organization on the General Election ballot shall be placed in nomination by independent nominating petition pursuant to C.R.S. 1-4-801." As the CLP's 1990 gubernatorial candidate, Heid was therefore required to register either as unaffiliated or as a Libertarian twelve months prior to filing his petition for nomination.

A.

We first address appellants' contention that the twelve-month unaffiliation requirement in § 1-4-801(1)(i) is an unconstitutional restriction on a political organization's right to choose its representative for public office in violation of the first and fourteenth amendments to the

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than the Citizens and Libertarian parties, and that it was the Secretary of State's responsibility to define the specifics for regulating which political organizations may be designated on voter registration forms. *Id.*

United States Constitution and article II, section 5, of the Colorado Constitution. We disagree.

The United States Supreme Court has approached the constitutionality of ballot access restrictions in an inconsistent manner, at times applying a strict standard of scrutiny, *see Illinois State Bd. of Elections v. Socialist workers Party*, 440 U.S. 173 (1979); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968), and at other times employing a more flexible standard, *see Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (following *Storer v. Brown*, 415 U.S. 724, 730 (1974); there is "no litmus-paper test for separating those restrictions that are valid from those that are invidious . . . . Decision in this context . . . is very much a 'matter of degree,' very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' " (Citations omitted.)); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See National Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988) (the Supreme Court "has only provided limited definitive guidance in determining the validity of restrictions on ballot access."); L. Tribe, *American Constitutional Law* § 13-20 (2d ed. 1988) (discusses Supreme Court's inconsistent approach to ballot access cases).

This court has favored the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), wherein the Court advised that, in determining the constitutionality of a ballot access restriction, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the

> plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789. *See National Prohibition Party*, 752 P.2d at 83-84.

Appellants seek protection of their right to associate politically as guaranteed by the first and fourteenth amendments to the United States Constitution. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). It is well understood that "[f]reedom of association is considered to be an element of the broad right to freedom of expression and protects 'the right of individuals to associate to further their personal beliefs.' " *State Bd. for Community Colleges and Occupational Educ.*, 687 P.2d 429, 439 (Colo. 1984) (quoting *Healy v. James*, 408 U.S. 169, 181 (1972)).

A disaffiliation requirement for prospective political candidates, such as the one at issue, directly impacts those aspiring to public office, rather than the voters. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Although candidacy for public office has not been recognized as a fundamental right, *Bullock*, 405 U.S. at 142. "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143. Thus, ballot access restrictions imposed on candidates necessarily implicate voters' freedom of association by limiting the field of

candidates from which the voters might choose. *Celebrezze*, 460 U.S. at 787-88.

There is no question that political organizations enjoy the constitutionally protected freedom of association. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). This freedom to associate politically includes a voter's right to choose a political organization with which to associate, and a political organization's right to identify those people who constitute the association and to select a candidate who represents the organization's ideologies. *See id.* Therefore, restrictions on a political organization's access to an election ballot burden two fundamental rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams*, 393 U.S. at 30; *accord Munro*, 479 U.S. at 193; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *National Prohibition Party*, 752 P.2d at 83. Despite the fundamental nature of these rights, they are not absolute and are necessarily subject to limitation. *Celebrezze*, 460 U.S. at 788; *National Prohibition Party*, 752 P.2d at 83. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Munro*, 479 U.S. at 193. Indeed, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Celebrezze*, 460 U.S. at 788.

We therefore must evaluate the state's interests in imposing a twelve-month unaffiliation requirement on

prospective candidates of a qualified political organization, such as the CLP, to determine whether those interests justify the impingement on the organization's associational rights. The federal courts previously upheld the constitutionality of section 1-4-801(1)(i), 1B C.R.S. (1980), in *Thournir v. Meyer*, 708 F. Supp. 1183 (D. Colo. 1989), *aff'd*, 909 F.2d 408 (10th Cir. 1990). There, the plaintiff registered as unaffiliated in Colorado only one month before filing a nominating petition as an unaffiliated candidate for Congress, stating that she failed to register early because she was unaware of section 1-4-801(1)(i)'s time requirement and that she had decided to run for office only six months prior to filing her petition. Applying the *Celebrezze* test, Judge Carrigan of the United States District Court for Colorado found that section 1-4-801(1)(i)

> does not discriminate unfairly against independent candidates. Rather, the statute works against would be independent candidates prompted by short-range political or personal motives, or who seek to bleed off votes in the general election that otherwise might go to a particular major party candidate. Colorado has an interest in insuring that voters are not presented with a "laundry list" of candidates who have decided on the eve of a major election to seek public office.

Thournir, 708 F. Supp. at 1187. In so holding, Judge Carrigan relied on the Supreme Court's resolution in *Storer v. Brown*, 415 U.S. 724 (1974), which we also believe to be dispositive.

In *Storer*, the Supreme Court upheld a California election statute that denied ballot access to an independent candidate seeking elective public office if the candidate had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. *Id.* at 736. In finding California's disaffiliation requirement constitutional, the Court stated as follows:

> *The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot.* It involves no discrimination against independents.
>
> . . . .
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> The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.
>
> . . . [The disaffiliation statute] protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a

> substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.
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> *. . . It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.*

Storer, 415 U.S. at 733-36 (emphasis added).[6] In our view, the state's compelling interest in "maintaining the integrity of the various routes to the ballot" is served by imposing the unaffiliation requirement on prospective candidates of political organizations as well. We therefore hold that Colorado's one-year unaffiliation requirement preserves the state's compelling interest in "maintaining the integrity" of its ballot access system, *see Storer*, 415 U.S. at 733, and thus promotes the overall stability of the state's

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[6] The Supreme Court reaffirmed *Storer* in *Munro v. Socialist Worker's Party*, 479 U.S. 189, 198 (1986). The Court noted, however, that the statute upheld in *Storer* imposed a disaffiliation requirement that, if unsatisfied, barred ballot access, *id.* at 198, whereas the statute challenged in *Munro* imposed a restriction that did not bar access to primary election ballots, *id.* at 191-93. Thus, while political organizations challenged ballot restrictions in both cases, only the *Storer* requirement raised "concerns of constitutional dimension" by virtue of its potential absolute ban on ballot access. Since the *Storer* court considered the constitutional concerns presented by a disaffiliation requirement, *Storer* thus provides the best framework for resolving appellants' constitutional challenge to section 1-4-801(1)(i)'s unaffiliation requirement.

election process, without "unfairly or unnecessarily" impinging upon the CLP's associational rights. *See Clements v. Fashing*, 457 U.S. 957, 964 (1982) ("The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' ") (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). "Although a disaffiliation provision may preclude . . . voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements." *Celebrezze*, 460 U.S. at 792 n. 12.

Our holding is consistent with other cases upholding state disaffiliation requirements. In *Anderson v. Hooper*, 632 F.2d 116 (10th Cir. 1980), the Tenth Circuit relied on *Storer* to sustain the constitutionality of New Mexico's disaffiliation provision, which required independent candidates to have no political party affiliation after January 1 of the general election year. In *Davis v. State Election Board*, 762 P.2d 932 (Okla. 1988), the Supreme Court of Oklahoma upheld a six-month disaffiliation requirement for independent candidates as "a reasonable ballot access restriction," stating that the statute "[did] not exclude independent candidates from the ballot. It merely insure[d] that one who files for office as an 'independent' is in fact nonpartisan." *Id.* at 934. *See also Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (court held that *voter* affiliation requirement served the legitimate state purpose of deterring party "raiding" and "did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."). Similarly, section 1-4-801(1)(i) does not exclude CLP candidates from the

ballot; it merely discourages those potential candidates "prompted by short-range political goals, pique, or personal quarrel," and disrupts the practice of diverting votes that might go to another political party or organization. *Storer*, 415 U.S. at 735.

Appellants cite *Tashjian v. Republican Party*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), in support of their argument that section 1-4-801(1)(i) is an unconstitutional restriction on a political organization's right to choose its representatives. In *Tashjian*, the Republican Party of Connecticut challenged the constitutionality of a state statute requiring voters in any political party primary to be registered members of that party. The Republican Party had adopted a rule allowing independent voters to vote in Republican primaries. The Court struck down the state's enforcement of its closed primary system as an unreasonable burden on the first amendment rights of the Republican Party. *Tashjian*, 479 U.S. at 225. In reaching this conclusion, the Court distinguished *Storer*, stating:

> The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the

> protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Id. at 224.[7]

In *Eu*, certain California election laws prohibited the official governing bodies of political parties from endorsing candidates in party primaries, and dictated the internal organization of political parties. The Court invalidated the challenged laws because they burdened the first amendment rights of political parties and their

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[7] The Court also qualified its holding, stating that its decision

> [did] not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 752 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were designed to prevent.

Tashjian, 479 U.S. at 224-25 n.13. Under this rationale, a state could restrict a person to becoming a candidate for only one political entity in an election year. Thus, it is not impermissible for Colorado to prevent Heid from presenting himself to the voters as a Libertarian-Republican candidate as he had apparently intended.

members without serving a compelling state interest. *Eu*, 489 U.S. at 233. We find *Eu* inapplicable since it addresses *intra-political party* concerns and not the situation in the present case where a political organization's lack of any affiliation requirement for prospective candidates has a disorganizing effect on other political parties or organizations.

The appellants' reliance on *Tashjian* and *Eu* is misplaced in that they do not address the issue of whether the state may make distinctions between political organizations and political parties in maintaining the integrity of the political process of its ballot access system in order to promote the overall stability of the state's election process. *See Storer*, 415 U.S. at 733, 737; *see also Munro*, 479 U.S. 189. We conclude that Colorado's one-year unaffiliation requirement preserves the state's compelling interest in maintaining a fair election process, without unfairly or unnecessarily impinging upon Heid's and the CLP's associational rights.

B.

We now address the appellants' claim that section 1-4-801(1)(i), 1B C.R.S. (1980), imposes a twelve-month unaffiliation requirement on political organization candidates that is not imposed on candidates of the two major political parties, and that the statute is therefore an unconstitutional violation of the appellants' right to equal protection under the fourteenth amendment to the United States Constitution and article II, section 25, of the Colorado Constitution. In advancing an equal protection argument, "it is the claimant's burden to 'demonstrate in the

first instance a discrimination against [him] of some substance.' " *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (quoting *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)). Appellants have failed to carry this burden. We thus find their argument to be without merit.

The Colorado election code distinguishes political organizations from political parties. A political organization is defined as "any group of registered electors who, by petition for nomination of an independent candidate as provided in section 1-4-801, places upon the official general election ballot nominees for public office." § 1-1-104(17), 1B C.R.S. (1990 Supp.). Section 1-4-801(1)(i) provides in relevant part:

> No person shall be placed in nomination by petition unless the person . . . was registered as unaffiliated . . . for at least twelve months prior to the date of filing of the petition.[8]

It is undisputed that the CLP qualifies as a political organization.

In contrast, a political party is defined by the election code to mean "any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election." § 1-1-104(18), 1B C.R.S. (1973). The election code does not require political

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[8] Under Rule 16, 8 C.C.R. 1505-1 (1984), the term "unaffiliated" in the statute means unaffiliated with a political party.

parties to comply with section 1-4-801 in order to place nominees on general election ballots.

The election code allows a political organization to become a political party if it commands a modicum of support among the electorate. *See* § 1-4-801(1)(b), 1B C.R.S. (1990). A political party, similarly, can become a political organization if its popular support decreases. *See National Prohibition Party v. State*, 752 P.2d 80 (Colo. 1988) ("Any political entity that fails to receive at least ten percent of the total vote cast in the preceding gubernatorial election is a 'political organization' subject to section 1-4-801(1)."). [9] The code thus distinguishes political organizations from political parties, but does not, however, prevent organizations from becoming parties.

Political organizations and political parties are thus not similarly situated under the election code. Political organizations can be accorded dissimilar treatment from political parties, therefore, if they are not unfairly deprived of exercising their fundamental rights. *See* J. Nowak & R. Rotunda, *Constitutional Law* 568 (4th ed. 1991) ("[T]he Court has increasingly focused upon the

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[9] *See Clements v. People ex rel. Lee*, 58 Colo. 105, 109-10, 143 P. 834 (1914) ("it clearly appears that an association of qualified electors who, by petition, place upon the official ballot individual nominees for public office, constitute and are a 'political organization'; that as a condition precedent for such 'political organization' to become a 'political party' within the meaning of the act, it shall participate in such election, and, in addition thereto, cast for its candidate for governor at least ten per cent of the total vote cast at such election.") (interpreting the similar precursors of today's election code).

concept of equal protection to guarantee that all individuals are accorded fair treatment in the exercise of fundamental rights. . . . "). The permissibility of this dissimilar treatment is the basis for appellants' contention that section 1-4-801(1)(i)'s sole application to political organizations denies them equal protection of the laws and discriminates against them in their exercise of a fundamental right.

This court has previously considered whether section 1-4-801(1) deprives political organizations of equal protection of the laws. *National Prohibition Party*, 752 P.2d at 83. Petitioners argued therein that section 1-4-801(1) "unconstitutionally discriminates against political organizations by requiring them to bear burdens that are not imposed on majority party candidates." *Id.* Specifically, petitioners challenged the requirement that "each candidate for public office who is either independent or affiliated with a political organization . . . circulate and file a separate petition before his [or her] name can appear on the ballot." *Id.* at 81. We noted that "[t]he burdens placed on political organizations under section 1-4-801(1) are no more restrictive than those placed on candidates from political parties. . . . To require political organizations . . . to comply with the elaborate requirements for a political party would inhibit such entities from placing candidates on the ballot." *Id.* at 85 (citing §§ 1-4-601 to -701). We found that Colorado's interests in preserving "the integrity of the electoral process by avoiding voter confusion, ballot overcrowding, and the presence of frivolous candidates" outweighed the burdens imposed on petitioners' constitutional rights. *Id.* We thus held that

section 1-4-801(1) satisfied the requirements of equal protection of the laws. *Id.*

With respect to the one-year unaffiliation requirement, we have evaluated the burden that section 1-4-801(1)(i) imposes an appellants' constitutional rights, and concluded that the requirement outweighs the burden by preserving Colorado's interest in "maintaining the integrity" of its ballot access system. *See* part II.A. (citing *Storer v. Brown*, 415 U.S. 724 (1974)). Because the requirement serves compelling state interests, the election code's different treatment of political parties and organizations does not deprive appellants of equal protection of the laws. In fact, the dissimilar treatment may facilitate political organizations' access to ballots. *Id.*[10]

The election code's dissimilar treatment is thus permissible under the federal and state constitutions.

III.

In conclusion, we hold that section 1-4-801(1)(i) is constitutional, and accordingly affirm the district court.

JUSTICE LOHR specially concurs.

JUSTICE MULLARKEY specially concurs.

JUSTICE QUINN dissents.

Colorado Libertarian Party v. Secretary of State, No. 90SA382
JUSTICE LOHR specially concurring:

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[10] Appellants' contention that they are discriminated against because political parties can author their own unaffiliation requirements thus fails as appellants are not unfairly burdened by section 1-4-801(1)(i) in their access to the ballot.

I concur in the result reached by the majority but write separately to express the reasons for this agreement.

The rights at issue in this case are those of petitioners Colorado Libertarian Party (CLP) and Robin Heid to political association as guaranteed by the first and fourteenth amendments to the United States Constitution and article II, section 5, of the Colorado Constitution, and to equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution and article II, section 25, of the Colorado Constitution.

Storer v. Brown, 415 U.S. 724 (1973), is dispositive of the arguments of CLP and Heid that the twelve month unaffiliation requirement in section 1-4-801(1)(i), 1B C.R.S. (1980), violates their rights to political association under the first and fourteenth amendments to the United States Constitution. In that case, independent candidates for public office sought a declaration that certain provisions of the California Elections Code violated their political association rights under the first and fourteenth amendments. The provisions in question denied a ballot position to an independent candidate for elective public office who had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. In order to qualify for a position on the ballot, a person registered with a qualified political party had to disaffiliate seventeen months or more before the general election. The United States Supreme Court upheld California's disaffiliation requirement against a challenge grounded on the political association rights protected by the first and fourteenth amendments. The court concluded that the disaffiliation

requirement furthers the state's interest in the stability of its political system, a compelling interest "outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." *Id.* at 736. *Storer* defeats the arguments of CLP and Heid that the one-year unaffiliation requirement in section 1-4-801(1)(i) violates their rights to political association under the federal constitution. Nothing in subsequent federal cases has called into question the basic holding of *Storer*. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 223 (1986) (invalidating requirement that voters in any political primary be registered members of that party); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 227 (1989) (invalidating ban on party endorsement of primary candidates and regulations on internal party governance).

The majority opinion and the special concurrence of Justice Mullarkey adequately demonstrate that political organizations and political parties are not similarly situated for the purpose of the equal protection analysis under the federal constitution. Accordingly, I agree that CLP and Heid have not established that the unaffiliation requirement of section 1-4-801(1)(i) violates their rights to equal protection of the laws under the fourteenth amendment of the federal constitution.

Although CLP and Heid assert in their briefs that the unaffiliation requirement violates their rights to political association under article II, section 5, of the Colorado Constitution and their rights to equal protection of the laws under article II, section 25, of our state constitution, they do not attempt to distinguish those rights from the companion rights guaranteed by the federal constitution.

Their arguments assume that the scope of the federal and state rights is identical.[1] As support for that proposition, the petitioners cite *MacGuire v. Houston*, 717 P.2d 948, 954-55 (Colo. 1986), and *National Prohibition Party v. State*, 752 P.2d 80, 83 n.4 (Colo. 1988).[2] *MacGuire*, however, does not support so broad a statement. There, we considered the narrow question of whether "the fundamental freedoms of association, political belief, and political participation" under the federal and state constitutions "require that unaffiliated voters or members of minority political parties be eligible to serve as election judges." *Id.* at 954-55. We held that the Colorado Constitution provided no greater protections than the federal constitution on this particular issue. *Id.* at 954-55. *MacGuire* provides the sole support for our statement in *National Prohibition Party v. State*, 752 P.2d at 83 n.4 (1988), that "[i]n testing the validity of restrictions on ballot access under the Colorado Constitution, we apply the requirements of federal law." The language in *National Prohibition Party* states the holding of *MacGuire* on this issue much too broadly.

The language of article II, section 5, of the Colorado Constitution is very different from the terms of the right

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[1] In fact, in their reply brief CLP and Heid argue that:

> [P]etitioners' rights to political association and equal protection under Article II, Sections 5 and 25 of the Colorado Constitution have also been violated; however, the analysis for those violations parallels the federal constitutional analysis.

Petitioners' Reply Brief at 1 n.1, 90SA382.

[2] Petitioners' Opening Brief at 5 n.3, 90SA382.

to political association as set forth in the first amendment to the United States Constitution.[3] In addition, as we observe in a decision announced today, we have a long tradition of providing greater protection of free speech under the Colorado Constitution than does the first amendment. *Bock v. Westminster Mall Co.*, No. 90SC433 (Colo. S. Ct. Oct. 8, 1991). The first amendment protects both free speech and the right to political association. Therefore, in a properly postured case I would not foreclose the possibility that the Colorado Constitution provides greater rights to political association than does the first amendment. In absence of any argument by counsel advancing or explicating such an argument, however, I do not consider the present case appropriate for consideration of that issue.

I concur in the judgment of the court.

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[3] Article II, section 5, of the Colorado Constitution provides:

> All elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

The first amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

COLORADO LIBERTARIAN PARTY -v- SECRETARY OF STATE, No. 90SA382

JUSTICE MULLARKEY specially concurring:

The Colorado Libertarian Party (CLP) and Robin Heid appeal the district court's ruling upholding the unaffiliation requirement of section 1-4-801(1)(i), 1B C.R.S. (1980), against constitutional attack under the First and Fourteenth Amendments to the United States Constitution and Article II, Section 5 of the Colorado Constitution. I agree with the court's result in this case, but specially concur because my analysis is different. There is no violation of appellants' right to equal protection of the laws because the CLP and the existing political parties are not similarly situated. Since the dissimilar treatment occurs in the peculiar context of elections and access to the official ballot, it is unnecessary to engage in the extended analysis of the appellants' First Amendment claim found in part II-A of the majority opinion. *Storer v. Brown*, 415 U.S. 724 (1974), subsequently approved in *Munroe v. Socialist Workers Party*, 479 U.S. 189 (1986), is dispositive.

I.

I begin by placing the contested statute in its proper context. Section 1-4-801(1)(i) is found in part 8 of the Colorado election code under the heading, "NOMINATION OF INDEPENDENT CANDIDATES," and provides in relevant part:

> No person shall be placed in nomination by petition unless the person . . . was registered as

> unaffiliated . . . for at least twelve months prior to the date of filing of the petition.

Under Rule 16, 8 C.C.R. 1505-1 (1984), the term "unaffiliated" in the statute means unaffiliated with a political party. Although the CLP calls itself a party, it is not a political party under the election code. The CLP is a political organization, while the only political entities currently qualifying as political parties in Colorado are the democratic and republican parties. Heid, who was a registered republican within the twelve month period, was denied access to the ballot by the secretary of state even though he was the CLP nominee.

A political organization is defined by statute to mean "any group of registered electors who, by petition for nomination of an independent candidate as provided in section 1-4-801, places upon the official general election ballot nominees for public office." § 1-1-104(17), 1B C.R.S. (1990 Supp.). In contrast, a political party is defined to mean "any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election." § 1-1-104(18), 1B C.R.S. (1973). Thus, a political party is a political organization, but a political organization is not necessarily a political party.

The statutory scheme, however, allows a political organization to *become* a political party if that organization manifests a low minimum of support among the electorate. Under section 1-4-801(1)(b), 1B C.R.S. (1990), a political organization can field an independent candidate,

for governor for example, by a petition signed by 1,000 registered electors statewide. Having secured that number of signatures or more, the independent candidate's political organization would qualify as a political party for the next election if that candidate garnered at least ten percent of the votes cast for governor. "Any political entity that fails to receive at least ten percent of the total vote cast in the preceding gubernatorial election is a 'political organization' subject to section 1-4-801(1)." *National Prohibition Party v. State*, 752 P.2d 80, 83 (Colo. 1988). *See Clements v. People ex rel. Lee*, 58 Colo. 105, 109-10, 143 P. 834, 835 (1914).

The election code, therefore, enacts a structured yet fluid method for access to the general ballot. A distinction is made between political organizations and political parties, but that distinction does not prevent organizations from becoming parties. Indeed, political parties also could return to being political organizations should their fortunes wane. The election code does not maintain a static political picture; rather, it maintains a "revolving door" through which minority ideologies can enter the mainstream.

These points are important for the analysis of CLP's equal protection challenge. Because political organizations and political parties are not similarly situated, political organizations and their prospective candidates can be accorded dissimilar treatment and, in fact, they are accorded different treatment under the election code. The two entities are treated differently because, under the statutes, political parties can override the twelve-month affiliation period by internal party rule, while political organizations enjoy no similar license to override the

twelve-month unaffiliation period by internal organization rule.

This disparate treatment, however, withstands the equal protection challenge because parties and organizations are not similarly situated, as I will show. That parties and organizations are not similarly situated in turn addresses the associational rights challenge under the First Amendment.

II.

Contrary to appellants' argument, this case does involve the statutory requirements designed to ensure sound access to the ballot, and not just the right of a political organization to select the candidate of its choice. The issue as to whether it is permissible for the state to make the distinction between political organizations and political parties is at the heart of this case since that distinction is the essential mechanism by which the state regulates the electoral process and restricts access to the ballot. In *Storer v. Brown*, 415 U.S. 724, 730 (1974), the Court acknowledged that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." More recently, in *Munro v. Socialist Workers Party*, the Court held that although restrictions upon ballot access "impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively," these rights of association "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." 479 U.S. 189, 193 (1986) (citing *Storer*).

Acknowledging the element of a *necessary* restriction of associational rights is crucial. It means that certain practical regulations of the electoral process, including restrictions on access to the ballot, can be accomplished only by qualifying or impinging on the right of association.[1] The requirement of having to demonstrate a modicum of public support before being allowed access to the ballot, for example, is at once a constitutionally valid restriction on the ballot *and* a permissible restriction or qualification of the right of association.

Addressing the validity of the distinction between political organizations and political parties is therefore necessary for any response to appellants' allegation that the election code violates their associational rights under the First Amendment. The election code is again the point of departure, for it is there that the difference between organizations and parties is explicitly established. By their terms, the statute set out the difference. A political organization is not a political party if or because its candidate has not received ten percent of the total gubernatorial vote in the preceding election. Consequently, a political organization must petition for access to the ballot with a certain number of qualified signatures, while its candidate must have been unaffiliated for twelve months prior to filing the petition. §§ 1-4-801(1)(b) and (i), 1B C.R.S. (1973 & 1990 Supp.).

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[1] This relationship does not hold of course for other fundamental rights, such as free speech. *See Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222-23 (1989).

This court has already decided that the state has a "substantial interest" in assuring that candidates demonstrate significant support precedent to their placement on the ballot. *National Prohibition Party*, 752 P.2d at 85. Moreover, the United States Supreme Court has made it "clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Munro*, 479 U.S. at 193. The signature and unaffiliation requirements both serve the state's substantial interest in conditioning access to the ballot upon a showing of support. The state's "interest, if no other, [is] in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Appellants concede that gathering 1,000 qualified signatures is no problem for the CLP and/or Heid. Indeed, appellants state that the actual number of signatures required is completely irrelevant. The relative burden of petition signatures is therefore not at issue here. I turn then to the unaffiliation requirement. In *Munro*, the Court reaffirmed *Storer*, which

> upheld California's statutory provisions that denied ballot access to an independent candidate if the candidate had been affiliated with any political party within one year prior to the immediately preceding primary election. [The Court] recognized that California had a "compelling" interest in maintaining the integrity of its political processes, and that the disaffiliation requirement furthered this interest and was therefore valid, even though it was an absolute bar to attaining a ballot position.

Munro, 479 U.S. at 195.[2] In fact, under Colorado law there is no absolute bar to Heid's future CLP candidacy. Heid merely has to gather the requisite number of qualified signatures and remember to register to vote as anything but a republican or democrat (*i.e.*, unaffiliated). This calls for nothing more than a "reasonably diligent independent candidate." *Storer*, 415 U.S. at 742.

Furthermore, the *Munro* Court held that a state does not shoulder "the burden of demonstrating empirically the objective effects on political stability that were produced by the 1-year disaffiliation requirement." 479 U.S. at 195. Neither is the state required to "prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions." *Id.* Thus, appellants' arguments that the secretary of state has failed to demonstrate the possibility of disarray and confusion are futile.

I again emphasize that the code affords ample opportunity both for political organizations to reach the status of political parties and for existing political parties to exit the political stage. The burden on the right of association, therefore, is not fixed, but may be shed or assumed depending on electoral success or failure. The danger of political monopoly by the major parties is thus avoided

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[2] *Storer* thus retains its vigor, even after *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In fact, the *Celebrezze* opinion, which invalidated Ohio's early filing deadlines for independent candidates, noted that a disaffiliation requirement is substantially different from an early filing requirement. 460 U.S. at 804. *Storer* also was reaffirmed in *Eu v. San Francisco Democratic Comm.*, 489 U.S. at 231 (1989).

under Colorado's election code. *Storer*, 415 U.S. at 729. That the two existing major parties have lately monopolized political life in Colorado may perhaps be due to their ability to adapt to the changing attitudes of their partisans and/or to adopt the promising platforms of rising political organizations. I note that here, Heid himself, by his dual candidacy, aspired to meld CLP ideology with that of the republican party. Thus, the election code's "revolving door" is the means by which the state provides a feasible means of access to the general election ballot, pursuant to constitutional mandate. *Storer*, 415 U.S. at 728.

The election code's different treatment of parties and organizations is permissible under the federal and state constitutions. Hence, I agree that the trial court's judgment should be affirmed.

Colorado Libertarian Party v. Secretary of State, No. 90SA382

JUSTICE QUINN dissenting:

The predominant constitutional interest at stake in this case is not the interest of Robin Heid in obtaining access to the ballot. Although Heid's interest in ballot access is not without significance, it clearly is secondary to the far more important associational interests of the members of the Colorado Libertarian Party in designating and selecting their candidate for a statewide office in accordance with the party's own rules of governance. The majority, emphasizing the need to maintain the integrity of Colorado's ballot access system and to promote the

stability of the state's election process, maj. op. at 13, unduly depreciates the constitutionally protected right of an organized political association to designate its nominee for elective office pursuant to internal party standards. Because I cannot square the majority's resolution of this case with the elevated status due to the associational interests of members belonging to a bona fide political organization, I dissent.

I.

The facts are undisputed. On April 21, 1990, the Colorado Libertarian party, in convention, nominated Robin Heid, who was a member of the party, as its candidate for Governor of Colorado. Under the Libertarian Party's constitution and bylaws, a person can become a member either by registering as a Libertarian voter or by paying dues. Heid became a member of the Libertarian Party by paying dues, and he also was a registered member of the Republican Party.

Following his nomination for Governor, Heid submitted a petition to the Secretary of State for placement of his name on the November 1990 ballot. When Heid filed his petition, the Colorado Libertarian Party satisfied the criteria for a "qualified political organization" pursuant to rules promulgated by the Secretary of State. *See* rules 16-1 to 16-9, 8 C.C.R. 1505-1 (1984). Rule 16.1 defines a qualified political organization as "one which has placed on the ballot at a congressional vacancy or general election a candidate for district or state office and whose officers have filed under oath with the Secretary of State the required proof of organization and which continues

to meet the requirements of 16.3 and 16.4." The required proof of organization, as defined by Rule 16.2, must include the bylaws of the political organization, its method for selecting officers and delegates to political conventions, and its method of "selecting candidates planning to petition onto the state's general election ballot," as well as the names, addresses, and telephone numbers of the officers or committee members of the organization." Rule 16.3 requires a qualified political association to meet once a year, and Rule 16.4 requires the organization to place a candidate or candidates on the general election ballot every two years. The rules promulgated by the Secretary of State also include procedures for voter registration that permit an individual to register in a manner that reflects the voter's affiliation with a qualified political organization. *See* Rule 16.5, 8 C.C.R. 1505-1 (1984). Rule 16.6 requires candidates "wishing to represent a qualified political organization on the general ballot to be placed in nomination by independent nominating petition pursuant to C.R.S. 1-4-801."

Heid's petition contained the requisite number of voter signatures for nomination of an independent candidate by petition. *See* § 1-4-801(1)(b), 1B C.R.S. (1990 Supp.) (petition for office of governor must contain signatures of 1,000 or more registered electors). In the case of an independent candidate seeking access to the ballot by petition, section 1-4-801(1)(i), 1B C.R.S. (1980), states that "[n]o person shall be placed in nomination by petition unless the person . . . was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition." In contrast to the unaffiliation requirement

applicable to the candidates of a qualified political organization, Colorado's statutory scheme provides that in the case of candidates of a major political party,[1] the major party's certificate or designation of candidates shall certify that the candidate for a particular office "has been a member of said political party for the period of time required by rule of the candidate's political party or by law if the party has no such rule." § 1-4-601(2), 1B C.R.S. (1990 Supp.).

The Secretary of State rejected Heid's petition because he had not compiied with the one year statutory unaffiliation requirement of section 1-4-801(1)(i). After the Secretary of State rejected the petition, the Colorado Libertarian Party and Heid filed a petition in the Denver District Court seeking injunctive and declaratory relief on the basis that the unaffiliation requirement of section 1-4-801(1)(i) violated their constitutional rights to freedom of association and to equal protection of the law under the United States and Colorado constitutions. The district court determined that the statute was constitutional and denied injunctive relief. This appeal followed.

II.

Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments to the United States Constitution. *Eu v. San Francisco*

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[1] A major political party is defined as any political organization which cast for its candidate for governor at least ten percent of the total votes cast at the last preceding gubernatorial election, § 1-1-104(18), 1B C.R.S. (1980).

County Democratic Central Committee, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). This same associational interest is protected by various provisions of the Colorado constitution. Colo. Const. art. II, § 5 (right to free and open elections and prohibition against interference with free exercise of right of suffrage); art. II, § 10 (freedom of speech); art. II, § 24 (right to peaceably assemble and petition government for redress of grievances); art. II, § 25 (protection against deprivation of liberty without due process of law). "Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association." *Eu*, 489 U.S. at 224. This constitutionally protected associational interest applies not only to major political parties but also to minor political organizations which espouse a particular political ideology. *Id.* at 219.[2]

Because the right of a political organization's nominee to ballot access is intertwined with the associational interests of the organization's members, the legal standard for determining the validity of state restrictions on ballot access is not susceptible of mechanical application. Indeed, the determination is one in which few answers are written in black and white. Rather, the grays are dominant, and the shades are many.

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[2] The plaintiffs in *Eu* were various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California. 489 U.S. at 219.

A.

One line of cases, as noted by the majority, emphasizes the state's interest in ensuring political stability by imposing restrictions on minor political candidates seeking access to the ballot in a general election. For example, in *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court considered a California statutory scheme which required an independent candidate to file nomination papers signed by voters not less than five percent in number of the entire vote cast in the preceding general election in the area for which the candidate seeks to run, and which also prohibited ballot access to an independent candidate if the candidate had a registered affiliation with a qualified political party within one year immediately preceding the primary election. The Court upheld the five-percent petition requirement on the basis that the independent candidacy route was "but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries." *Id.* at 733. Addressing the statutory unaffiliation requirement, the Court concluded that it was "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot," and that the state's interest in the stability of its political system was compelling and outweighed the interest which "the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." *Id.* at 733, 736. It should be pointed out that *Storer*, in emphasizing the state's interest in preserving political stability, gave but scant consideration to the associational interests of the independent candidate's supporters and, in that

respect, seems to be in considerable tension with other decisions of the Court.

Subsequent to *Storer*, the Supreme Court decided *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), in which the Court upheld a Washington statutory requirement that a minor-party candidate for partisan statewide office receive at least one percent of all votes cast for that office in the state's primary election as a condition for placement of the candidate's name on the general election ballot. Because the Socialist Workers Party's candidate for United States Senator received less than one percent of the total votes cast for the office of United States Senator in the state's primary election, the candidate's name was not placed on the general election ballot. The Supreme Court analyzed the Washington statute in light of the following two basic principles: first, that "[r]estrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively," 479 U.S. at 193; and second, that states "may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* Assessing the impact of the Washington statute on the associational interests of the minor-party candidate's supporters, the Court concluded that the statute was "more accommodating of First Amendment rights and values" than was the statute in *Storer*:

> Here . . . Washington virtually guarantees what the parties challenging the . . . California election laws so vigorously sought – candidate access to a statewide ballot. This is a significant

> difference. Washington has chosen a vehicle by which minor-party candidates must demonstrate voter support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions. It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election. It is true that voters must make choices as they vote at the primary, but there are no state-imposed obstacles impairing voters in the exercise of their choices. Washington simply has not substantially burdened the "availability of political opportunity."

479 U.S. at 199 (citation omitted).

In the instant case, neither Heid nor the Colorado Libertarian Party challenge Colorado's right to require a candidate to demonstrate a modicum of support among potential voters in order to qualify for a place on the ballot in the general election. Indeed, it is undisputed that the Secretary of State denied Heid a place on the ballot not because he failed to demonstrate the requisite amount of voter support, but because he was not registered as unaffiliated for at least twelve months prior to the filing of the petition. Under these circumstances, *Storer* and *Munro* are meager authority for resolving the associational interests at issue here.[3]

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[3] In a fashion similar to *Storer*, the federal district court's opinion in *Thournir v. Meyer*, 708 F.Supp. 1183 (D. Colo. 1989),

(Continued on following page)

B.

Given the fact that the only basis for the Secretary of State's denial of ballot access to Heid was the unaffiliation requirement, the controlling authority for this case can be found in that line of cases which assess the validity of restrictions on minor-party candidates and political organizations by analyzing the effect of the restrictions on the associational interests of the candidate's or organization's supporters. The Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Eu v. San Francisco County Democratic Central Committee*, 489 US. 214 (1989), are representative of this analytical tack. Analysis of the effects of statutory restrictions on the associational interests of a minor-candidate's supporters or a political organization's members is appropriate, in my view, because an election campaign is an effective platform for the expression of views on the issues of the day and a political organization's candidate serves as the standard bearer and a rallying point for persons joined together by reason of a similar political ideology.

(Continued from previous page)

aff'd on other grounds, 909 F.2d 408 (10th Cir. 1990), focuses exclusively on the state's interest in regulating ballot access of the independent candidate and does not address the associational interests of the candidate's supporters. I therefore find the majority's reliance on *Thournir* as equally misplaced as its reliance on *Storer*.

In *Anderson*, 460 U.S. 780, the Supreme Court considered whether an Ohio statutory restriction on ballot access for an independent candidate burdened the associational interests of the candidate and his supporters. The statute in question required the independent candidate to file a statement of candidacy and a nominating petition in March in order to appear on the general ballot in November. The March filing date preceded the date at which major political parties were required to name their candidates. In invalidating the Ohio statute, the Court stated:

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. . . . Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. . . . The results of this evaluation will not be automatic; as we have

> recognized, there is "no substitute for the hard judgments that must be made."

460 U.S. at 789-90 (citations and footnotes omitted).

Application of this standard led the Court to conclude that the early filing date did not sufficiently advance the interests put forth by the state to justify such a significant restriction on the voters' freedom of association.

Subsequent to *Anderson*, the Court more fully developed the associational component of state restrictions on the governance of political organizations in *Tashjian*, 479 U.S. 208, and *Eu*, 489 U.S. 214. Both cases concerned the associational rights of political organizations and attempted to delineate the extent to which a state may interfere with the internal structure of the organization or with an activity integral to the association's political goals. In *Tashjian*, the Court struck down a state statute which had the effect of overriding a Republican Party rule that permitted independent voters to vote in Republican primaries. In describing the burden placed on the Republican Party by the statute, the Court stated:

> The statute here places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

479 U.S. at 215-16. The Court further observed that if the state were "to provide that only Party members might be selected as the Party's chosen nominees for public office,

such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals." *Id.* at 215. *Tashjian* stands for the principle that a state may enact laws "to prevent the disruption . . . of political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 U.S. at 224.

Subsequent to *Tashjian*, the Court in *Eu*, 489 U.S. 214, invalidated California statutes that prohibited the official governing bodies of political parties from endorsing candidates in party primaries and that prescribed regulations for the internal organization of political parties. Reiterating the principle that a state statute that burdens the rights of political parties and their members can survive constitutional scrutiny "only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest," *Id.* at 222, the Court outlined the scope of the associational interests of political organizations as follows:

> Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, . . . but also that a political party has a right to " 'identify the people who constitute the association,' " . . . and to select a "standard bearer who best represents the party's ideologies and preferences. . . . "
>
> Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates

> "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community". . . . Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."

489 U.S. 224-25 (citations omitted).

Because the unaffiliation requirement utilized by the Secretary of State to deny ballot access to Heid directly implicated the associational interests of members of the Colorado Libertarian Party, I believe that the principles enunciated in *Anderson*, *Tashjian*, and *Eu* provide the analytical framework for resolving this case.

III.

The majority acknowledges that the one year unaffiliation requirement imposes a significant burden on the constitutionally protected associational interests of members of the Colorado Libertarian Party. Maj. op. at 9-10. With that observation I certainly agree. The majority further identifies the governmental interests underlying the one year unaffiliation requirement as "the state's compelling interest in 'maintaining the integrity' of its ballot access system" and promoting the overall stability of the state's election process. Maj. op. at 13. I have no disagreement with the compelling nature of these interests. Where I part company with the majority is in its

assessment of the primacy of these interests over the constitutionally protected associational interests of members of the Colorado Libertarian Party and in the majority's apparent assumption that the one-year unaffiliation requirement is narrowly tailored to effectuate the identified state interests.

The majority concludes that the one year unaffiliation requirement "does not exclude CLP candidates from the ballot," but merely discourages political candidates prompted by short range political goals and prevents the practice of "diverting votes that might go to another political party or organization." Maj. op. at 14-15. The underlying assumption of the majority's analysis seems to be that so long as a political organization is afforded the opportunity to place some candidates on the ballot, its associational interests are adequately protected. This analysis, in my view, misses the significance of the nature of a political organization's associational interests. Freedom of association for the members of a political organization means the right of the organization to select as its own standard bearer that person who will best represent the organization's ideologies and preferences. *Eu*, 489 U.S. at 224.

I have no quarrel with the majority's suggestion that the state has a valid interest in seeking to curtail the practice of "raiding." *See* maj. op. at 14. "Raiding" occurs when "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Tashjian*, 479 U.S. at 219 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973)). Party raiding, however, while a legitimate concern in party primaries, is not implicated in a

general election where voters can vote for whichever candidate they desire. *Anderson*, 460 U.S. at 801-02 n.29.

Although the interests identified by the majority – namely, maintaining the integrity of the ballot access system and promoting the overall stability of the state's election process, maj. op. at 13 – may properly be characterized as compelling. I am at a loss to understand how the one year unaffiliation requirement is narrowly tailored to effectuate those interests or why less burdensome restrictions could not further those same interests. Since Heid is legitimately a member of the Libertarian Party, there is no risk of voter confusion in placing his name on the ballot. As the Supreme Court observed in *Anderson*, individual voters are well able to inform themselves about campaign issues and candidates. 460 U.S. at 797.

The integrity of the ballot access system can certainly be protected by alternative measures less drastic than preventing a political organization from designating its own standard bearer in accordance with its own rules of governance. Preventing a defeated primary candidate from running as the candidate of another party in the general election or prohibiting a candidate from running on more than one ticket would certainly serve the state interests identified by the majority. Moreover, if the state's interests in maintaining the integrity of the ballot access system and promoting the stability of the election process are not jeopardized by the statutory requirement that a major political party's candidate need only satisfy the party's membership rule in order to qualify for ballot access, § 1-4-601(2), 1B C.R.S. (1990 Supp.), I fail to see how the state can justify the one-year unaffiliation

requirement for the nominee of a bona fide political organization when the nominee, as here, fully satisfies the membership requirements of the organization. Clearly, a much shorter period of unaffiliation would adequately serve the state's interests and at the same time would effectively accommodate the associational interests of the members of a recognized political organization.

I would reverse the judgment of the district court and declare the one year unaffiliation requirement violative of the constitutional right to freedom of political association guaranteed to members of the Colorado Libertarian Party by the United States and Colorado Constitutions.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 90CV8486, Courtroom 6

ORDER

COLORADO LIBERTARIAN PARTY, *et al.*,

Plaintiffs,

v.

SECRETARY OF STATE OF COLORADO,

Defendant.

The above case came on for hearing this 10th day of September, 1990. Petitioners appeared by their attorney, and defendant appeared by her attorney, an the Court having heard the testimony, and arguments of the attorneys, examined the exhibits and briefs of the parties and being fully advised, doth find;

1. That this court has jurisdiction of the subject matter of this proceeding.

2. That Mr. Heid has been registered as a member of the Republican party since 1980, and a member of the National Liberation party since May, 1988, but has never registered as a such [sic] a member.

3. That Sec. 1-4-801(2)(i), C.R.S. (1980) provides:

> No person shall be placed in nomination by petition unless the person is a registered elector of the political subdivision or district in which the officer is to be elected and unless he has registered as unaffiliated, as shown on the books of the county clerk and recorder, for at

least twelve months prior to the date of filing of the petition. [sic]

4. That Sec. 1-4-801(1)(i) was modified by the decision in *Baer v. Meyer,* 728 F.2nd 471, 474 (10th circuit 1984). An independent candidate may petition to get on the ballot if he is registered in the name of a political organization or as unaffiliated. In this case, Heid would have had to have registered as a Libertarian or an unaffiliated at least 12 months before the date on which he submitted his petition.

5. That Sec. 1-4-801(1)(i) is not unconstitutional under the Constitutions of the United States or the State of Colorado.

It is therefore ordered that Natalie Meyer, secretary of State of Colorado acted properly in rejecting the petition for nomination for the office of Govenor [sic] and Lieutenant Govenor [sic] filed on behalf of Mr. Heid.

It is further ordered that petitioners are not entitled to any relief as requested in their verified petition filed in this court.

BY THE COURT:

/s/ Ralph H. Coyte
Ralph H. Coyte
Judge
Denver District Court

cc: All counsel

NOMINATION OF INDEPENDENT CANDIDATES

1-4-801. Petitions for nominating independent candidates. (1) Candidates for public offices to be filled at a general or congressional vacancy election who do not wish to affiliate with a political party may be nominated, other than by a primary election or a convention, in the following manner:

(a) A petition for nominating independent candidates shall be prepared which shall contain the name and address of any candidate for the office to be filled. The petition shall designate in not more than three words the political or other name which the signers select. No name of any political party shall be used, in whole or in part, for this purpose. Each petition shall contain only the name of one candidate for one office; except that any such petition for a candidate for governor shall also include a candidate for lieutenant governor, and together they shall be considered joint candidates at the general election. In the case of nominations for electors of president and vice president of the United States, the names of the candidates for president and vice president may be added to the political or other name designated on the petition.

(b) The petition for each office shall be signed by registered electors residing within the district or political subdivision in which the officer is to be elected to the number of at least five thousand for the office of president and the office of vice president and one thousand when the nomination is for any other office to be filled or for joint candidates to be voted on by the registered electors of the entire state; of at least five hundred when

the office is to be filled by the registered electors of a congressional district; of at least one thousand or twenty percent of all the votes cast in the last preceding general election in the district for the office for which the petition is circulated, whichever is less, where the nomination is for a member of the general assembly, district attorney, or district office greater than a county office; and of at least six hundred or twenty percent of all the votes cast in the county for the office for which the petition is being circulated, whichever is less, when the nomination is for an office to be filled by the registered electors of a county.

(c) Every petition shall be signed only by registered electors. Unless physically unable, each registered elector shall sign his own signature and shall also print his name and his residence address, including the street and number, if any, the city or town, the county, and the date of signing. Any registered elector, except a circulator, may assist an elector who is physically unable to sign such petition in completing the information on the petition as required by law. On the petition immediately following the name of the disabled elector, the elector providing assistance shall sign his name and shall state that such assistance was rendered to the disabled elector. To each such petition shall be attached an affidavit of a registered elector, stating his address and stating that he is registered elector residing in the political subdivision in which he circulated said petition, that he circulated said petition, that each signature thereon was affixed in his presence, that each signature thereon is the signature of the person whose name it purports to be, and that to the best of the knowledge and belief of the affiant each of

the persons signing said petition was at the time of the signing a registered elector.

(d) The signatures to the petition need not all be appended to one paper, but no petition shall be legal that does not contain the requisite number of names of registered electors whose names do not appear on any other petition previously filed for the same office under the provisions of this section. Any petition may be amended in this last respect at any time prior to 3 p.m. on the Tuesday preceding the primary election or 3 p.m. on the fifty-fifth day preceding the congressional vacancy election.

(e) No petition, except petitions for candidates for vacancies to unexpired terms of representatives in congress and for presidential electors, shall be circulated or any signatures obtained thereon prior to forty-nine days before the primary election.

(f) The petition may designate or appoint upon the face thereof one or more persons as a committee to fill vacancies in accordance with section 1-4-903 (4) and (5).

(g) Every petition, before the same is filled with the proper officer, shall have endorsed thereon or appended thereto in writing on the first or last sheet the acceptance of the candidate or joint candidate of the nomination by acknowledgment before any officer authorized to take acknowledgements. The acceptance of nomination shall contain the full name of each candidate or joint candidate as it will appear on the ballot and the full address of each.

(h) The petition, when executed and acknowledged as prescribed in paragraph (g) of this subsection (1), shall

be filed with the secretary of state if for an office to be filled by the electors of the entire state or of a congressional district or for the offices of members of the general assembly or district attorney or a district office greater than a county office and with the county clerk and recorder if for a county office. Petitions shall be filed not later than 3 p.m. on the Tuesday preceding the primary election or 3 p.m. on the fifty-fifth day preceding the congressional vacancy election. Upon receiving such petition, the official in charge of the election for the office sought by such nominee shall cause to be sent to such nominee a written notice stating whether the submitted petition appears to be sufficient.

(i) No person shall be placed in nomination by petition unless the person is a registered elector of the political subdivision or district in which the officer is to be elected and unless he was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition; except that, if such nomination is for a nonpartisan election, such person shall be a registered elector of such political subdivision or district and be a registered elector, as shown on the books of the county clerk and recorder, on the date of the earliest signature on the petition.

Section 1-4-801, C.R.S. 1B (1980 & 1990 Supp.)

"Political organization" means any group of registered electors who, by petition for nomination of an independent candidate as provided in section 1-4-801, places upon the official general election ballot nominees for public office.

Section 1-1-104 (17), C.R.S. 1B (1990).

"Political party" means any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election.

Section 1-1-104 (18), C.R.S. 1B (1980).

When any controversy arises between any official charged with any duty or function under this code and any candidate, the officers or representatives of any political party, persons who have made nominations, or any other person, the district court, upon the filing of a verified petition by any such official or person setting forth in concise form the nature of the controversy and the relief sought, shall issue an order commanding the respondent in such petition to appear before the court and answer under oath to such petition. The court shall summarily hear and dispose of any such issues with a view to obtaining substantial compliance with the provisions of this code by the parties to such controversy, shall make and enter orders and judgments, and shall issue the writ or process of such court to enforce all such orders and judgments.

Section 1-1-112 (1), C.R.S. 1B (1980).

POLITICAL PARTY DESIGNATION FOR PRIMARY ELECTION

1-4-601. Designation of candidates for primary election. (1) Assemblies of the several political parties may make assembly designations of candidates for nomination on the primary election ballot. No assembly shall be held later than sixty-five days preceding the primary election.

(2) An assembly shall take no more than two ballots upon candidates for each office within the jurisdiction of the assembly to be filled at the ensuing general election. Every candidate receiving thirty percent or more of the votes of all duly accredited delegates who are present and voting at such assembly for any office to be voted upon at the ensuing general election shall be certified by affidavit of the presiding officer and secretary of the assembly. If no candidate receives thirty percent or more of the votes of all duly accredited delegates who are present and voting at such assembly, there shall be a second ballot cast on all the candidates for that office. If on the second ballot no candidate receives thirty percent or more of the votes cast, the two candidates receiving the highest number of votes shall be certified as candidates for that office by the assembly. The certificate of designation by assembly shall state the name of the office for which each person is a candidate and his name and address, and shall designate in not more than three words the name of the political party which the candidate represents, and shall certify that the candidate has been a member of said political party for the

period of time required by rule of the candidate's political party or by law if the party has no such rule, as shown on the registration books of the county clerk and recorder. The certificate of designation shall indicate the order of the vote received at the assembly by candidates for each office, but no assembly shall declare that any one candidate has received the nomination of the assembly. The certificate of designation shall be filed in accordance with section 1-4-604. If two or more candidates receiving designation under the provisions of this subsection (2) have received an equal number of votes, the order of certification of designation shall be determined by lot by such candidates. The assembly shall select a vacancy committee for vacancies in designation or nomination only.

(3) Within ten days after the adjournment of the assembly, each candidate designated by assembly shall file his written acceptance with the officer with whom his certificate of designation is filed. In the acceptance, he shall state his name in the form in which he wishes it to appear on the ballot. The name may include one nickname. If an acceptance is not filed within the specified time, the candidate shall be deemed to have declined the designation.

(4) (a) No person shall be eligible for designation by assembly as a candidate for nomination at any primary election unless such person has been affiliated with the political party holding the assembly for a period of at least twelve months immediately preceding the date of the assembly, as shown by the registration books of the county clerk and recorder.

(b) Repealed, L. 89, p. 314, § 3, effective April 12, 1989.

Section 1-4-601, C.R.S. 1B (1990).

Rule 16 Concerning Elections

16. Qualified Political Organization by order of 10th Circuit Court of Appeals March 1, 1984

16.1 A qualified political organization is one which has placed on the ballot at a congressional vacancy or general election a candidate for district or state office and whose officers have filed under oath with the Secretary of State the required proof of organization and which continues to meet the requirements of 16.3 and 16.4.

16.2 The required proof of organization shall include, but shall not be limited to:

a) Bylaws of the Colorado political organization which shall include the method for selecting officers, selecting delegates to county, state and national conventions, and selecting candidates planning to petition onto the state's general election ballot, using the name of the Colorado political organization;

b) The names, addresses, telephone numbers of the elected Colorado chairman, vice chairman and secretary, together with the names, addresses and telephone numbers of all other members elected or appointed to other offices or committees authorized by the bylaws.

16.3 Qualified political organizations shall meet once a year.

a) The meeting in the odd numbered year shall be held for the purpose of electing a chairman, vice chairman and secretary and such other officers or committees as

shall be provided for in the bylaws on file with the Secretary of State. By May 1 of the odd numbered year, the chairman and secretary under oath shall file a full and complete list of the persons elected or appointed pursuant to rule 16.2, together with any amendments to the bylaws adopted at the meeting.

b) The meeting in the even numbered year shall be held for the purpose of selecting candidates who wish to use the political organization name on petitions for the next ensuing general election.

16.4 A qualified political organization shall place a candidate or candidates on the general election ballot every two years.

16.5 The procedure for voter registration shall be

a) When an individual appears at any office or location for the purpose of voter registration, questions asked and the information recorded shall be amended to reflect "political organization" affiliation.

b) When asking the specific questions listed in C.R.S. 1-2-203 question (2) (j) shall be expanded to read:

"The elector's party affiliation, if any, if the qualified elector desires to affiliate with any political party; the elector's political organization, if any."

If neither a political party affiliation or political organization affiliation is declared, the elector shall continue to be registered as "unaffiliated."

c) The opportunity for transfer of political organization affiliation shall be provided exactly as the law requires for political parties (C.R.S. 1-2-203 (2) (j)).

d) At any time, a declaration or change in affiliation is requested, the same procedure shall be used for political party and political organization.

e) In recording the information on the voter registration page or affidavit, the affiliation with a political organization shall be listed by the name entry of the organization followed by (Pol. O.)

In converting information on the voter registration page to lists, submissions for data entry, Secretary of State's master voter registration file, etc., standard abbreviations shall be used and will be furnished to the County Clerks and Recorders by the Secretary of State.

f) When an individual requests affiliation with a political organization which has not met the requirements of 16.1, the entry on the voter registration page shall be placed under "remarks."

g) The Secretary of State will notify County Clerks and Recorders by June 1 of each odd numbered year of the loss of qualified status of a political organization for failure to place candidates on the ballot as stated in Rule 16.1, or to hold the organizational meeting as required in Rule 16.3. Upon such notification the County Clerk and

Recorder shall mark on every affected voter registration page "Not qualified as of _____".
date

16.6 Candidates wishing to represent a qualified political organization on the General Election ballot shall be placed in nomination by independent nominating petition pursuant to C.R.S. 1-4-801.

a) Each petition shall contain the name of one candidate and shall have attached an affidavit signed under oath by the Chairman and Secretary of the qualified political organization. The Affidavit form shall be approved by the Secretary of State and will include the date of the meeting required in 16.3 b).

b) For the purposes of the 1984 General Election, a candidate shall be eligible to use the name of the qualified political organization and file and independent nominating petition, providing the candidate's voter registration page shows affiliation with the qualified political organization listed on the petition at the time of filing and continuously through the date of the next ensuing general election.

16.7 Print-outs, lists, tapes, etc. of voter registration files shall be furnished to qualified political organizations at the same rate or cost as charged to political parties. The only exception to this provision shall be the list furnished to the major political parties prior to the statutory precinct caucus day.

16.8 On all summary reports of voter registration by political party a supplemental report shall be provided which separates the "unaffiliated" category into unaffiliated and those registered with qualified political organizations on file with the Secretary of State and so certified to the County Clerks.

16.9 Electors whose voter registration page shows affiliation with a qualified political organization who appear to vote at the political party primary election shall complete a Declaration of Party Affiliation, thus losing affiliation with the qualified political organization.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 88CV7646, Courtroom 6

REPORTER'S TRANSCRIPT

COLORADO DEMOCRATIC PARTY and BUIE SEAWELL, State Chair of the Colorado Democratic Party,

Petitioners,

v.

NATALIE MEYER, SECRETARY OF STATE OF COLORADO,

Respondent.

The hearing in this matter commenced on Monday, May 2, 1988, before the HONORABLE CLIFTON A. FLOWERS, Chief Judge of the District Court.

This transcript contains the ruling of the Court in this matter.

FOR THE PETITIONERS:	Richard W. Daily, Esq. L. Richard Freese, Jr., Esq. Elizabeth J. Lentini, Esq. Pamela R. Mackey, Esq.
FOR THE RESPONDENT:	No appearance

* * *

[p. 2] THE COURT: The Court is prepared to rule. This matter is before the Court pursuant to the provisions of C.R.S., 1-1-112, of the Colorado Election

Code of 1980. The existence of a valid controversy between the Petitioners and the Respondent within the meaning and intent of C.R.S., 1-1-112, is alleged by the Petitioners and conceded by the Respondent Secretary of State. The Court, therefore, finds that it has jurisdiction over the parties and the subject matter of this controversy pursuant to C.R.S., 1-1-112.

The Court finds that on April 10, 1988, the State Central Committee of the Colorado Democratic Party amended their rules to provide that a person will be eligible for designation by assembly as a candidate for nomination at the primary election, or for appointment to a vacancy in such designation, if that person has been a registered Democrat for at least twelve months immediately preceding the date of the general election next following such primary election. C.R.S., 1-1-104(1), defines the term "assembly".

The rule of the Colorado Democratic Party, as amended, was made applicable to the 1988 Primary and General Elections. The instant controversy has arisen because of the conflict between the amended rule of the [p. 3] Democratic Party and C.R.S., 1-4-601(4), which provides in material part that no person shall be eligible for designation by assembly as a candidate for nomination at the primary election unless such person has been affiliated with the political party holding the assembly for at least twelve months immediately preceding the date of the assembly.

And also, the controversy arises by virtue of 1-4-101(3), C.R.S., which provides, in substance, that the Secretary of State shall not place the name of any person

on the general election ballot who does not meet those qualifications as set forth in Section 601(4). The issue before the Court is whether, in view of the rule adopted by the Democratic Party, the statutes, 1-4-601(4) and 1-4-101(3), can be constitutionally enforced agairst the Democratic Party by the Secretary of State so as to deprive a person who meets the requirements of their rule, but who does not meet the requirements of the statutes, from a position on the primary election ballot or the subsequent general election ballot.

Several prior decisions of the Colorado Supreme Court have upheld the constitutionality of the Colorado statute, but none of those cases involved a conflict with the rules of a major political party such [p. 4] as is involved in the case at bar. Those prior Colorado Supreme Court cases are – and I don't know that this is all of them, but these are the significant cases in my opinion, those cases are *Anderson v. Kilmer*, a 1956 Supreme Court case, appearing at 302 P.2d 185; *Spain v. Fischahs*, a 1960 case, appearing at 354 P.2d 502; *Murphy v. Trott*, a 1966 case, appearing at 417 P.2d 234; *Ray v. Michelson*, a 1978 case, appearing at 584 P.2d 1215; and *In Re: Weber*, a 1974 case, appearing at 525 P.2d 465.

And, indeed, I have had occasion over the past several years to rule, in accordance with the Colorado statutes cited, that a candidate who had not been affiliated with either the Democratic or Republican party for at least one year prior to the assembly was not eligible for designation at that assembly. But in none of those cases was the statute in conflict with a rule of the party as is the case in the matter now before the Court. And as I previously mentioned, in none of the Colorado Supreme Court

cases that I cited was there a rule of one of the two major political parties that was in conflict with the provisions of the statute.

In view of the rule adopted by the Colorado Democratic Party and in light of the decision of the [p. 5] United States Supreme Court in the case of *Tashjian v. The Republican Party of Connecticut*, I am of the opinion that the Colorado statutes, C.R.S., 1-4-601(4) and 1-4-101(3), cannot constitutionally be enforced as against the Colorado Democratic Party or its members. The *Tashjian* case was decided December 10, 1986, by the U.S. Supreme Court and is reported at 107 S.Ct. 544 and at 93 L.Ed.2d 415.

In that case the Supreme Court of the United States held that a Connecticut statute that prohibited independent voters from voting in party primary elections violated the party's right to freedom of association guaranteed under the First and Fourteenth Amendments to the United States Constitution. The Republican Party of Connecticut had adopted a rule permitting unaffiliated or independent voters to vote in that party's primary elections.

In the course of its opinion, the Supreme Court in *Tashjian* said, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the due process clause of the Fourteenth Amendment which embraces freedom of speech." Further, "The freedom of association protected by the First and Fourteenth Amendments includes partisan [p. 6] political organizations and the right to associate with the political party as one's

choice is an integral part of this basic constitutional freedom." Further, the U.S. Supreme Court said "The freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' "

And then the Supreme Court stated what I believe to be probably the key to the controversy presently before this Court. The U.S. Supreme Court said, and this is on page 524 of 93 L.Ed.2d, "Were the state to provide that only party members might be selected as the party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the party's members under the First Amendment to organize with like-minded citizens in support of common political goals." I think that's probably the key to this present controversy, that language.

The Court in *Tashjian* went on to say, and I quote, "In the present case, the state statute is defended on the ground that it protects the integrity of the party against the party itself." I think what the Supreme Court was indicating there, let the party fend for itself. If the party wants to let in people [p. 7] who haven't been affiliated with them for a year, that's their prerogative. I thought that quote was rather interesting.

I want to quote a few more excerpts from the *Tashjian* case. It seems to be the only case that is directly in point. The Court went on to say, among other things, they were discussing the argument that the state was trying to protect the Connecticut Republican Party from its own fate, and the U.S. Supreme Court said, "But on this point,

even if the state were correct, a state or a court may not constitutionally substitute its own judgment for that of the party. The party's determination of the boundaries of its own association and of the structure which best allows it to pursue its political goals is protected by the Constitution."

The U.S. Supreme Court then concluded by saying that, "We conclude that the state's enforcement under these circumstances of its closed primary system burdens the First Amendment rights of the party. The interests which the Appellant" – who was the Secretary of State of Connecticut – "The interests which the Appellant adduces in support of the statute are insubstantial and, accordingly, the statute as applied to the Republican Party of Connecticut is [p. 8] unconstitutional." The Court in *Tashjian* found, as I quoted, "no compelling state interest that needed protection."

And I would revert back to the *Weber* case, *In Re: Weber*, which I previously cited, which is a 1974 Colorado Supreme Court case, which did involve Section 1-4-601(4) of the Colorado Election Code, and in that case, the *Weber* case, the Supreme Court of Colorado ruled that that statute was a "proper exercise of a compelling state interest in the reasonable regulation of political party primaries." Nevertheless, I'm convinced that *Weber* would not be controlling in Colorado at the present time for several reasons.

In *Weber*, there was no showing that the Colorado Republican Party had a rule, such as the Colorado Democratic Party has in the instant case, which would have permitted Weber to be designated according to the

Republican Party rules. I think that distinguishes *Weber* from the instant controversy. I find *Weber*, further, to be no longer controlling in a case such as this where the party, the Colorado Democratic Party, has changed its rules so as to permit a person to be designated at the assembly for nomination at the party primary even though such person has not been affiliated with the party for twelve [p. 9] months.

And in light of the decision of the U.S. Supreme Court in *Tashjian*, I believe that our Supreme Court would also hold that *Weber* is no longer controlling in a case such as that presently before this Court. And it should be noted that in the instant case the Colorado Democratic Party has amended its rules so as to permit a person to be designated by assembly as a candidate for nomination at the forthcoming primary election so long as that person will have been a registered Democrat for a period of at least twelve months immediately preceding the November 1988 General Election.

And I should point out that the rule doesn't refer to the 1988 election. I'm interpolating a little bit there. The rule is a general rule which would permit designation so long as the person has been registered with the Colorado Democratic Party immediately preceding a November general election.

The provisions of the two statutes here involved, 1-4-601(4) and 1-4-101(3), are in conflict with the amended rule of the Colorado Democratic Party and, if enforced, will prohibit persons from being designated at the upcoming Colorado Democratic Assembly as a candidate for nomination at the primary election [p. 10] for the

office of, among other things, Congresswoman for the Sixth Congressional District, and I don't think it's any big secret that we're talking about Ms. Martha Ezzard.

If the statutes are enforced against the Colorado Democratic Party, Ms. Ezzard will not be able to be designated at the Colorado Democratic Assembly as a candidate for Congress in the Sixth Congressional District. I think it should be kept in mind that this is not a situation where Ms. Ezzard, for example, is seeking to force her candidacy upon the Colorado Democratic Party contrary to the party's desires, but rather a situation where the party, the Colorado Democratic Party, is welcoming Ms. Ezzard with open arms and has amended its own rules to accommodate her candidacy.

So I think this instant case is distinguishable from some of the earlier cases in Colorado, for example, where the political party had not changed their rules and the candidate was simply attempting to circumvent the statutory provisions. It's a situation here, in other words, wherein Ms. Ezzard has elected to join the ranks of the Colorado Democratic Party and the Colorado Democratic Party has elected to permit her to associate politically with [p. 11] them. And I think under the First and Fourteenth Amendments and in light of the *Tashjian* decision, she has a right to do that and so does the Colorado Democratic Party have the right to permit her to do that.

The Court concludes, therefore, that for the State of Colorado to enforce the provisions of 1-4-601(4) and 1-4-101(3) against the Petitioners herein, the Colorado Democratic Party and Buie Seawell as the State Chair of

the Colorado Democratic Party, would be to impermissibly burden the First Amendment rights of association of the Colorado Democratic Party and the due process rights of the party to freedom of association under the Fourteenth Amendment and that, accordingly, these two statutes as applied to the Colorado Democratic Party are unconstitutional.

The Court further concludes that these two statutes are not supported by any compelling state interest as applied to the Petitioners in the instant case. I think under the decision in *Tashjian*, only the Colorado Democratic Party has the right to determine who may be a candidate for public office under the banner of the Colorado Democratic Party within certain restrictions, of course. There are other statutory requirements or qualifications for public office, but [p. 12] short of that, simply on the issue of affiliation alone, I think the Colorado Democratic Party has a right to determine who may be affiliated with that party.

For the reasons stated, it's therefore ordered, adjudged and declared by the Court that the provisions of C.R.S., 1-4-601(4) and 1-4-101(3), are unconstitutional as applied to the Petitioners, Colorado Democratic Party and Buie Seawell as its State Chair, and the members of the Colorado Democratic Party. It's further ordered by the Court that the Respondent herein, Natalie Meyer, in her capacity as Secretary of State of the State of Colorado, be and she is hereby permanently enjoined and restrained from enforcing the provisions of C.R.S., 1-4-601(4) and 1-4-101(3), as against the Petitioners herein, the Colorado Democratic Party and Buie Seawell in His Capacity as State Chair of the Colorado Democratic Party, as to any

person who qualifies to seek nomination as a Democrat under the rule of the Colorado Democratic Party and who otherwise meets the statutory requirements for candidacy. It's further ordered that the parties hereto shall bear their own court costs.

Anything else, Mr. Daily?

MR. DAILY: That seems to do it, Your Honor. [p. 13] Thank you very much.

(Whereupon, the hearing was concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter of Courtroom 6, District Court, City and County of Denver, Colorado, at the time and place above set forth.

Dated at Denver, Colorado, May 3, 1988.

/s/ Susan J. Smith
Susan J. Smith, CSR

FILED
MAR 31 1992
OFFICE OF THE CLERK

No. 91-1285

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

COLORADO LIBERTARIAN PARTY and ROBIN HEID,
Petitioners,
vs.
SECRETARY OF STATE OF COLORADO, Natalie Meyer in her official capacity and not individually,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Colorado Supreme Court
Case No. 90SA382

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the First Amendment Colorado may prohibit an independent candidate from running as a nominee for an entity which is not a party if that person is a registered member of a political party and was rejected as a candidate by the political party?

2. Whether Colorado's requirement that a person who intends to be a candidate for nomination of a political party or a political organization must be registered with the appropriate public official as a member of that political party or organization constitutes a denial of equal protection?

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No. 91-1285

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

COLORADO LIBERTARIAN PARTY and ROBIN HEID,
Petitioners,
vs.
SECRETARY OF STATE OF COLORADO, Natalie Meyer, in her official capacity and not individually,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Colorado Supreme Court
Case No. 90SA382

Respondent Colorado Secretary of State Natalie Meyer urges the Court not to grant the petition for certiorari in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the United States Constitution states in part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances.

Amendment 14 to the United States Constitution provides, in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Colo. Rev. Stat. § 1-4-601 (1991 Supp.) provides, in part:

> (1) Assemblies of the several political parties may make assembly designations of candidates for nomination on the primary election ballot....
>
> (2) ... The certificate of designation by assembly shall state the name of the office for which each person is a candidate and his name and address, and shall designate in not more than three words the name of the political party which the candidate represents, and shall certify that the candidate has been a member of said political party for the period of time required by rule of the candidate's political party or by law if the party has no such rule, as shown on the registration books of the county clerk and recorder.
>
> (4)(a) No person shall be eligible for designation by assembly as a candidate for nomination at any primary election unless such person has been affiliated with the political party holding the assembly for a period of at least twelve months

> immediately preceding the date of the assembly, as shown by the registration books of the county clerk and recorder.

Colo. Rev. Stat. § 1-4-801(1)(i) (1980) provides in part:

> No person shall be placed in nomination by petition unless the person ... was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition.

STATEMENT OF THE CASE AND FACTS

Petitioners fail to mention crucial facts which are pertinent to this petition.

Colorado law differentiates between a political party, a political organization and a qualified political organization. The Colorado Libertarian Party (hereinafter "CLP") is a "qualified political organization." A qualified political organization is one which has placed on the ballot at a congressional vacancy or general election a candidate for district or state office and which meets certain other procedural requirements. Rule 16.1, 8 Colo. Code Regs. § 1505-1 (1984) (Petitioners' App. 59). *See Baer v. Meyer*, 728 F.2d 471, 475-76 (10th Cir. 1984).

A "political organization" is defined by statute as "any group of registered electors who, by petition for nomination of an independent candidate as provided in Colo. Rev. Stat. § 1-4-801 (1980), places upon the official general election ballot nominees for public office." Colo. Rev. Stat. § 1-1-104(17) (1980).

A "political party" is defined as "any political organization which at the last preceding gubernatorial election was represented on the official ballot either by regular party candidates or by individual nominees only if it cast for its gubernatorial candidate at least ten percent of the total gubernatorial vote cast in the state at such election." Colo. Rev. Stat. § 1-1-104(18) (1980). Political parties are not required to circulate petitions to place their candidates on the ballot.

A person who is a candidate for public office on behalf of a political party must be registered as a member of that party with the appropriate election officer for the period of time established by party rule, or if the party does not have such a rule, for a period of twelve months preceding the date of the party's assembly. Colo. Rev. Stat. § 1-4-601(2) and (4)(a) (1991 Supp.). A candidate who is nominated on behalf of a political organization must be registered as unaffiliated for a period of twelve months prior to the date of filing of his nominating petition. Colo. Rev. Stat. § 1-4-801(1)(i) (1980).

A candidate who is nominated on behalf of a "qualified political organization" must be registered as unaffiliated or as a member of his qualified political organization for a period of twelve months prior to the date of filing his nominating petition. Rule 16.6, 8 Colo. Code Regs. § 1505-1 (1984) (Petition for Certiorari, App. 60). The Colorado nomination process is described in more detail in the Colorado Supreme Court's decision below (Petition for Certiorari, App. A).

Petitioner Robin Heid (hereinafter "Heid") has been a registered Republican since April 25, 1980. On May 27, 1988, he paid a $25 membership fee to join the CLP. Pursuant to CLP procedures, the fee entitled Heid to membership in the CLP for one year. He did not alter his voter registration. In 1988, Heid circulated a petition for nomination as the CLP candidate in

Colorado's First Congressional District. He did not receive the minimum number of signatures required to place him on the ballot.

In December 1989, Heid met with the directors of the CLP. They agreed that Heid would run for the governorship on behalf of the CLP. Heid asked the CLP to draft him rather than have him solicit the nomination of the CLP so that it would "look better to the Republicans" (App. A).

In March 1990, the Communications Director of the CLP stated in a party newsletter that Heid decided to run for the Republican nomination for governor. Heid and the CLP reasoned that, at a minimum, his candidacy for the Republican nomination would garner more publicity for his Libertarian gubernatorial candidacy. If he gained the Republican nomination, he would run as Libertarian-Republican. By running Heid as a Libertarian-Republican, the CLP hoped to obtain political party status by garnering at least ten percent of the votes in the gubernatorial race (Apps. B and C).

On April 21, 1990, Heid again paid his $25 membership. On the same day, he became the 1990 gubernatorial nominee for the CLP. He remained a registered Republican. He did not register as a Libertarian or as unaffiliated. On June 9, 1990, Heid allowed his name to be placed in nomination as the Republican candidate for governor. Votes were tallied on his behalf, but before the vote totals were announced, Heid committed his vote to John Andrews, the eventual Republican gubernatorial nominee.

On or about June 23, 1990, Heid commenced circulating his petition for nomination as the Libertarian gubernatorial candidate. Heid obtained sufficient signatures to have his name placed on the ballot. Heid submitted his petition to the Secretary of State who rejected the petitions on the ground that Heid had been registered as a Republican rather than as a Libertarian or as unaffiliated for

twelve months prior to the filing of the petition. The Secretary did allow the CLP to substitute another gubernatorial candidate.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Heid and the CLP have failed to establish that the issues are worthy of consideration by this Court. The decision below is in full accord with applicable constitutional standards; the result is fair and accurate; and the facts are unique.

A. The Colorado Supreme Court Correctly Applied the Standards of This Court to a Quintessential Attempt to Create Disorder and Confusion in the Political Process.

The decision reached by the Colorado Supreme Court comports with prior decisions by this Court. Contrary to their contention, the Colorado Supreme Court applied the appropriate test. Citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Colorado Supreme Court found that it must consider the legitimacy and strength of the state's interest and the extent to which the state's interests are "necessary" to burden the petitioners' rights. *Colorado Libertarian Party v. Secretary of State*, 817 P.2d 998, 1001-1002 (Colo. 1991). It concluded that the requirement that a candidate on behalf of a political organization must be registered as unaffiliated or as a member of that organization does not unnecessarily burden petitioners' rights.

Colorado's requirements assure that one political entity cannot undermine the nomination process of a competing entity or

confuse the public. *Tashjian v. Republican Party*, 479 U.S. 208, 224-25 n.13 (1986); *Storer v. Brown*, 415 U.S. 724 (1974). The facts of this case bear witness to the need for the requirements. Almost a year before the election, the CLP and Heid intended to deceive the Republican Party. Unbeknownst to the Republican Party, the CLP and Heid hoped to gain publicity and political capital by participating in the Republican nomination process. They also hoped to confuse the public about Heid's party affiliation in order to obtain the number of votes necessary to qualify the CLP as a political party (Apps. B and C).

Despite the protestations of Heid and the CLP to the contrary, the CLP is only a group of individuals who may register as members of the CLP and who may place independent candidates on the ballot by petition. *Baer v. Meyer, supra*. Because the case involves access to the ballot of an independent candidate who is presently affiliated with a major political party, the legitimacy of the twelve-month disaffiliation requirement is governed by *Storer v. Brown, supra*. The *Storer* court sustained a twelve-month disaffiliation requirement to prevent a party from "fielding an independent candidate to capture and bleed off votes in the general election that might well go to another party." *Id.* 735. *See also Rosario v. Rockefeller*, 410 U.S. 752 (1973).

B. Colorado Requires That Candidates of Both Political Parties and Political Organizations Be Registered as Members Thereof.

The CLP and Heid claim that the Colorado Supreme Court's decision "creates an unreasoned distinction between the constitutional rights of major and minor political parties (Petition for Writ of Certiorari, p. 12).

Petitioners' argument contains two fundamental errors. First, the CLP is not a minor political party. A minor political party must have attained at least ten percent of the total vote cast in the last gubernatorial election. Colo. Rev. Stat. § 1-1-104(16) and (18) (1980). Instead, the CLP is a qualified political organization because it has not been able to attain the minimum number of votes to qualify as a minor party.

Second, the CLP and Heid were not treated differently from political parties. Under Colorado law, neither a political party nor a political organization can offer a person for nomination unless that person is formally registered as a member of that party or organization. Colo. Rev. Stat. § 1-4-601(2) (1991 Supp.) and Colo. Rev. Stat. § 1-4-801(1)(i) (1980). Thus, a registered Democrat cannot become a Republican candidate for nomination in the Republican primary. Similarly, Heid's petition was rejected because he was a registered Republican who wished to run under the Libertarian banner.

C. Courts in Other Jurisdictions Have Sustained Similar Requirements.

The Colorado Supreme Court's decision is consistent with the decisions of courts in other jurisdictions. In *Thournir v. Meyer*, 708 F. Supp. 1183 (D. Colo. 1989), *aff'd.*, 909 F.2d 408 (10th Cir. 1990), the Court sustained the constitutionality of § 1-4-801(1)(i) against a challenge by a member of the Socialist Workers Party. The Court concluded that the twelve-month disaffiliation requirement works to prohibit independent candidates who seek to bleed off votes in a general election that might otherwise go to a particular major party candidate. *Thournir*, 708 F. Supp. at 1187. *See also Anderson v. Hooper*, 632 F.2d 116 (10th Cir. 1980).

The Oklahoma Supreme Court has sustained a statute similar to § 1-4-801(1)(i). *Davis v. State Election Board of Oklahoma*, 762 P.2d 932 (Okla. 1988). Oklahoma law required an independent candidate to be registered as an independent for a six-month period immediately preceding the first day of the filing period. The Oklahoma Supreme Court stated that the challenged provision provided an objective manifestation of the person's status as an independent candidate.

CONCLUSION

The Court should deny the petition for certiorari.

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APPENDIX A

Colorado Libertarian Party
Board of Directors
Minutes from December 9, 1989

....

Robin Heid's comments:

Heid wants to be drafted for the LP slot in the Governor 1990 race. He is also trying for the Republican nomination -- being "drafted" by the LP will look better to the Republicans than having apparently sought the LP nomination.

A VP candidate once had both Democratic and Republican nominations, so a joint LP/RP nomination is not impossible.

LP nomination lets him run even without the Republican nomination. His primary issue is ending the war on drugs.

Pro-2nd amendment people are mad at the Republicans, drug legalization proponents are mad at the Democrats -- this is the audience Heid wants to appeal to.

Heid says he has name recognition as well as talent at getting media attention. He is asking for our nomination, and for us to collect the necessary signatures, in return for which he feels confident he can bring in 10% of the vote. Jon Baraga claims 500-1000 signatures are needed for the Governors race -- we would have 6 weeks starting about the 23rd of June.

To get both nominations, Heid claims being a registered Republican and a paid Liberarian [sic] would satisfy both parties' requirements.

APPENDIX B

Excerpt from
COLORADO LIBERTARIAN PARTY CLIPBOARD
"Let's draft Robin Heid for guv!"
March 1990 Article By:
Noah Brodbeck
Official Publication of the
Colorado Libertarian Party
720 E. 18th Ave., Suite #309
Denver, CO 80203
(303) 837-9393

Robin Heid, political gadfly and former Libertarian statehouse candidate, has formally announced his candidacy for the Republican nomination for Governor. And he's serious, quite serious.

....

No need to worry, Robin is still Libertarian as ever, fervent about stopping this frontal assault on our human rights and civil liberties. That's good, had me worried for a minute. But why Republican? The answer is obvious: No self-respecting straight Republican wishes to be the sacrificial cow for the Democrats to slay this election. Robin realized that, and took that big leap into the ring, garnering more publicity in one shot than any Libertarian I can think of, even Ron Paul when he was here on his Presidential tour.

After talking to other Libertarians, a consensus formed, one that certainly holds promise for all of us. Let's begin a campaign to draft Robin Heid as the Libertarian candidate for Governor. The benefits should be apparent to everyone: Robin

has already been publicized; it should bring our argument on the War on Drugs to the forefront of the debate, and I think we could actually see a 15 to 30% voter return for our Libertarian-Republican candidate. It only takes 10% for the state to consider us a real party.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90CV9486, Courtroom 6

REPORTER'S TRANSCRIPT

COLORADO LIBERTARIAN PARTY AND ROBIN HEID,

Petitioners,

v.

SECRETARY OF STATE OF COLORADO, NATALIE MEYER, in her official capacity and not individually,

Respondent.

....

MS. PAGE: Your Honor, I would like to call Noah Broadbeck to the stand.

THE COURT: All right. Raise your right hand.

(Witness sworn.)

WITNESS: Yes, sir.

THE COURT: Thank you.

NOAH BRODBECK

called by Petitioners, having been duly sworn upon his oath, testified and was examined as hereinafter follows:

DIRECT EXAMINATION

BY MS. PAGE:

Q Could you state your name, please?

A Noah Brodbeck.

Q Could you spell your name for the record?

A N-O-A-H B-R-O-D-B-E-C-K.

Q Could you tell us what affiliation you have with the Colorado Libertarian Party?

THE COURT: Wait a minute. Would you please get behind the roster?

MS. PAGE: Excuse me, Your Honor.

THE COURT: If you don't use the roster, we get to talking too low, and then nobody can hear.

A I currently am unaffiliated with the Colorado Libertarian Party.

Q (By Ms. Page) Were you ever affiliated with the Colorado Libertarian Party?

A Yes, I was. I am a former Communications Director for the Colorado Libertarian Party and sat on the board.

Q Did you write an article in March of 1990 that appeared in the Colorado Libertarian Clipboard?

A Yes, I did.

Q In that article you made some statements about drafting Robin Heid as a candidate?

A Yes, ma'am.

Q Could you explain what you meant when you stated that Robin Heid would be good for the Libertarian Party?

A Can I see the article that you're referring to?

THE COURT: Do I have it here?

MS. PAGE: Yes, Your Honor. Thank you.

THE COURT: Would you mark that if you're going to refer to it?

MS. PAGE: Yes, Your Honor. This has been marked as Plaintiffs' Exhibit H.

Q (By Ms. Page) I hand you what has been marked as Plaintiffs' Exhibit H.

A All right. Which section?

Q In the third column, the full paragraph. Would you read that?

A After talking?

Q (Nodded head.)

A "After talking to other Libertarians, a consensus formed, one that certainly holds promise for all of us. Let's begin a campaign to draft Robin Heid as the Libertarian candidate for Governor. The benefits should be apparent to everyone. Robin has already been publicized. It should bring our argument on the war on drugs to the forefront of the debate, and I think we could actually see a 15 to 30% voter return for our Libertarian-Republican candidate. It only takes 10% for the state to consider us a real party."

Q What did you mean by Libertarian-Republican candidate?

A Libertarian-Republican candidate? Well, if the Republicans nominated him, he would be running as a Republican; and if we nominated him, he would be running as a Libertarian. So that hopefully we could get all the Republicans to -- well, Republicans vote for Republicans, so we could get them to vote for our candidate.

Q Okay. But you didn't mean that he would be a Libertarian candidate?

A Everybody --

THE COURT: Wait a minute. Don't you be telling him what he meant in the article.

MS. PAGE: Okay.

A No. I would hope that we could persuade Republicans to vote Libertarian. That's the idea. But if we ran

him in both parties, then we would have both members of both the parties being able to vote for him.

MS. PAGE: Thank you.

CROSS-EXAMINATION

BY MR. KNAIZER:

Q You would not admit, Mr. Brodbeck, that it would create some confusion for some of the voters to have somebody running as both a Libertarian and a Republican?

A Confusion?

Q Sure. They wouldn't know whether they're voting for a Republican or Libertarian, would they?

A Well, I assume that they might get two lines on the ballot.

Q Oh. So people could then vote for him twice if he gets two lines?

A I have no idea how elections -- I don't know. I assume if they nominated him as a Republican, he would then get a Republican slide. If he was nominated as a Libertarian, he would get a Libertarian slide.

Q And as a Libertarian, has anybody ever received 10% of the vote before in the state of Colorado to your knowledge?

A No.

Q Okay. And why did you -- why do you think then

that he would get a 15 to 30% voter return if he ran as a Libertarian-Republican?

A I wrote for a political newsletter. I don't necessarily have to say things that are entirely true. I attempt to drum up support within my party to hope that maybe we can get 30% of the vote and, therefore, persuade more people to vote.

Q So you don't necessarily say things that are true, is that correct?

A No, not always; not when I'm attempting to politically propagandize.

MR. KNAIZER: Thank you. That's all that I have.